UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA,
CARLENE BECHEN, RONALD BIENDSEIL,
RON BOONE, VERA BOONE, ELVIRA BUMPUS,
EVANJELINA CLEEREMAN, SHEILA COCHRAN,
LESLIE W. DAVIS III, BRETT ECKSTEIN,
MAXINE HOUGH, CLARENCE JOHNSON,
RICHARD KRESBACH, RICHARD LANGE,
GLADYS MANZANET, ROCHELLE MOORE,
AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS,
JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP,
and TRAVIS THYSSEN,

     Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE,
and RONALD KIND,

     Intervenor-Plaintiffs,

   v.   File No. 11-CV-562

Members of the Wisconsin Government
Accountability Board, each only in
his official capacity:
MICHAEL BRENNAN, DAVID DEININGER,
GERALD NICHOL, THOMAS CANE,
THOMAS BARLAND, and TIMOTHY VOCKE,

[Caption Continued]

VIDEOTAPE DEPOSITION

KENNETH R. MAYER, Ph.D.

Madison, Wisconsin
January 27, 2012

Susan C. Milleville, Court Reporter

2

and KEVIN KENNEDY, Director and
General Counsel for the Wisconsin
Government Accountability Board,

     Defendants,

F. JAMES SENSENBRENNER, JR.,
THOMAS E. PETRI, PAUL D. RYAN, JR.,
REID J. RIBBLE, and SEAN P. DUFFY,

     Intervenor-Defendants.
_____

VOCES DE LA FRONTERA, INC.,
RAMIRO VARA, OLGA WARA,
JOSE PEREZ, and ERICA RAMIREZ,

     Plaintiffs,

   v.   Case No. 11-CV-1011
                     JPS-DPW-RMD
Members of the Wisconsin Government
Accountability Board, each only in
his official capacity:
MICHAEL BRENNAN, DAVID DEININGER,
GERALD NICHOL, THOMAS CANE,
THOMAS BARLAND, and TIMOTHY VOCKE,
and KEVIN KENNEDY, Director and
General Counsel for the Wisconsin
Government Accountability Board,

     Defendants.
_____

1   I N D E X

2 Witness   Pages

3 KENNETH R. MAYER, Ph.D.

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7

8

9   E X H I B I T S

  (The original exhibits were attached to the original
   transcript and copies were provided to counsel)

**(The original deposition transcript was filed with
Attorney Daniel Kelly)**

3

1   VIDEOTAPE DEPOSITION of KENNETH R. MAYER, Ph.D.,

2 a witness of lawful age, taken on behalf of the

3 Defendants, wherein Alvin Baldus, et al., are

4 Plaintiffs, and Members of the Wisconsin Government

5 Accountability Board, et al., are Defendants, pending

6 in the United States District Court for the

7 Eastern District of Wisconsin, pursuant to notice and

8 subpoena, before Susan C. Milleville, a Court

9 Reporter and Notary Public in and for the State of

10 Wisconsin, at the offices of Godfrey & Kahn, S.C.,

11 Attorneys at Law, One East Main Street, in the City

12 of Madison, County of Dane, and State of Wisconsin,

13 on the 27th day of January 2012, commencing at 9:17

14 in the forenoon.

15

16

17   A P P E A R A N C E S

18

19 DOUGLAS M. POLAND, Attorney,
    for GODFREY & KAHN, S.C., Attorneys at Law,
20   One East Main Street, Suite 500, Madison,
       Wisconsin 53703, appearing on behalf of
21   Plaintiffs Alvin Baldus, et al.

22

  PETER G. EARLE, Attorney,
23 for LAW OFFICE OF PETER EARLE, LLC, Attorneys at Law,
       839 North Jefferson Street, Suite 300,
24   Milwaukee, Wisconsin 53202, appearing on behalf
       of Plaintiffs Voces De La Frontera, Inc.,
25   et al.

4

A P P E A R A N C E S (Continued)

MARIA S. LAZAR, Assistant Attorney General,
for STATE OF WISCONSIN DEPARTMENT OF JUSTICE,
    17 West Main Street, Madison, Wisconsin 53703,
    appearing on behalf of the Defendants.

DANIEL KELLY, Attorney,
for REINHART BOERNER VAN DEUREN S.C.,
    Attorneys at Law, 1000 North Water Street,
    Suite 2100, Milwaukee, Wisconsin 53202,
    appearing on behalf of the Defendants.

KELLEN C. KASPER, Attorney,
for FOLEY & LARDNER, LLP, Attorneys at Law,
    777 East Wisconsin Avenue, Milwaukee,
    Wisconsin 53202, appearing on behalf of the
    Intervenor-Defendants.

Also present: Todd S. Campbell, CLVS
               Campbell Legal Video Company
               417 Heather Lane, Suite B
               Fredonia, WI 53021
               (262) 447-2199

                KENNETH R. MAYER, Ph.D.,
        called as a witness, being first duly sworn,
        testified on oath as follows:

                   EXAMINATION
By Mr. Kelly:
Q Good morning.
A Good morning.
Q Before we get started, how would you like to be

— Page 5 —

addressed? Is it Mr. Mayer? Professor Mayer?
Dr. Mayer?
A Doctor or professor. Whatever you prefer.
Q Thank you. Professor Mayer, have you been deposed
   before?
A Yes, sir.
Q How many times?
A Three.
Q When was the last time you were deposed?
A I was deposed in 2009 I believe in a case in
   Arizona. It was at that point -- I would have to
   look at my vitae to get the name. I was working
   for the Arizona Department of Justice on a
   campaign finance case.
Q Do you recall the other two times you were
   deposed?
A I was deposed in that case twice and was also
   deposed in 2002 during the previous redistricting
   round which was Baumgart v. Wendelberger.
Q You probably remember some of the formalities that
   we observe in depositions then. You are probably
   a better experienced deponent than most. A few of
   the things that we will try to keep in mind is
   that we will make sure that all of our answers and
   all of my questions for that matter are verbal.

— Page 6 —

That is, we need to speak them all so that the
court reporter can take them down.
A Right.
Q So we will try to avoid shaking and nodding our
   heads and saying uh-huh and uh-uh because those
   can get taken down ambiguously. So if we can
   avoid that, that would be good. I'll try not to
   talk over the top of you when you're answering a
   question, and, if we can do that vice versa as
   well, that will make sure we have a nice clear
   record.
A Understood.
Q Also, if you would be so kind as to let me know if
   I ask a question that is not entirely clear. If I
   ask a question you answer, I'll assume that you
   understood what I was asking. So if there's any
   question in your mind about what I asked, please
   do let me know.
A Understood.
Q I would like to begin this morning by speaking
   generally about how one creates a new legislative
   district map. What are the factors that someone
   needs to consider in creating a new legislative
   district map?
A Well, there are a number of redistricting

— Page 7 —

principles. At the top of the list would be equal
population. With state legislative districts
those don't have to be exact. Wisconsin also
requires legislative districts to be contiguous,
compact, to show respect for existing political
subdivisions. And then there are some other
subsidiary factors which involve respecting
communities of interest, adherence to federal law
when it's applicable, particularly the Voting
Rights Act. Those are the major ones.
Q Are there any different standards when you're
   drawing a state assembly or senate map as opposed
   to a federal congressional map?
A Yes.
Q What are the differences?
A The primary difference is that the requirement of
   population equality is generally much stricter for
   congressional districts. As a rule, the
   congressional districts must be drawn in a way
   that gets the population as equal as possible, as
   practicable, which in many cases means that map
   drawers try to get the population deviations or
   the difference between the largest and smallest
   districts within a few people if they can't get
   them exactly equal.

— Page 8 —

1 Q Are there any other differences between drawing a
2   congressional district as opposed to a state
3   assembly or senate district?
4 A There can be. Some of it depends on the specific
5   requirements in various states about the processes
6   that they use. But in terms of the traditional
7   redistricting principles other than the different
8   treatment of population they are typically
9   considered to be similar.
10 Q Let's go through a few of the factors that you
11   mentioned. Speaking to begin with on state
12   assembly and senate districts with respect to
13   equal population, what's the standard? How close
14   does that need to get?
15 A Well, there's no hard and fast legal rule. There
16   is a widely understood rule of thumb that
17   population deviations below 10 percent are
18   acceptable, but that isn't an iron clad legal
19   principle. But generally the population equality
20   standards for state legislative districts you have
21   a little bit more latitude, they don't have to be
22   exactly equal, and that's in part because of the
23   practical issues involved that the smaller the
24   legislative district the more difficult -- and
25   larger the number of districts the more difficult

9

1 Q Do you know of any courts that have struck down a
2   state district map when the deviation was below
3   10 percent in population?
4 A I believe there is at least one instance when --
5   and, again, I don't have the case off the top of
6   my head. But it had a population deviation that
7   was close to 10 and it was overturned and as far
8   as I can recall on the principle that the
9   10 percent principle didn't mean that you could
10   get to 9.89 and feel like you had a safe harbor.
11 Q If you recall, do you know what other factors led
12   the court to strike down that plan that had a
13   population deviation that approached 10 percent?
14 A Not as I sit here. I would have to take a look at
15   the case.
16 Q You also mentioned that one of the reasons there's
17   some degree of latitude in equal population for
18   state legislative districts are the practical
19   difficulties of getting below that threshold.
20   What kind of practical difficulties are there?
21 A Well, the smaller the legislative district we're
22   talking about a movement of an absolute number of
23   people will constitute a larger percentage. When
24   you're dealing with a congressional district of
25   700,000 to 800,000 people, moving one or ten will

11

1   it can be to get that kind of equality.
2 Q You mentioned that the 10 percent is a widely
3   understood rule the thumb. Where does that rule
4   of thumb come from?
5 A I believe there is one or more supreme court
6   decisions that I don't recall the citations off
7   the top of my head where courts have accepted
8   deviations that are in the high single digits and
9   have typically rejected plans that are over,
10   significantly over or over, the 10 percent. But
11   to the best of my knowledge it's never been
12   articulated as a firm legal principle or standard.
13 Q Do you know if the supreme court decisions that
14   talked about the 10 percent rule of thumb -- were
15   those Wisconsin Supreme Court decisions or from
16   other states?
17 A From federal.
18 Q They're federal?
19 A Yes.
20 Q So your understanding would be that 10 percent
21   rule of thumb would be as applicable in Wisconsin
22   as in any other state?
23 A Yes, with the proviso that deviations around that
24   may or may not be acceptable depending on what
25   other state interests are implicated.

10

1   constitute a much smaller percentage than it would
2   when you're dealing with a legislative district
3   that might be, again, depending on the state, in
4   the tens of thousands. So just in terms of the
5   mathematics of it, the percentage deviations will
6   tend to be larger even if you move the same number
7   of people.
8 Q Do you know if there are other redistricting
9   principles that could be more important than
10   equalizing population?
11 A Let me think for a second. I'm going to say --
12   well, let me split my answer into two parts. On
13   the one hand, no, because if you don't get the
14   population equality standards correct, then unless
15   there is some overwhelming compelling reason, the
16   other principles rarely, if ever, can counteract
17   that failure. On the other hand, the fact that a
18   population deviation is within what might be
19   regarded as acceptable limits -- that doesn't mean
20   that you stop and say that there's nothing else
21   that could raise questions about whether a plan
22   was legal or valid. So if you don't make the
23   population equality requirements, I think there's
24   a presumption that the plan is invalid. If you do
25   make the population equality requirements, that

12

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1   doesn't necessarily mean that the plan is valid.

2 Q That would be because there are other factors that

3   need to be considered?

4 A That's correct.

5 Q Did we get in both pieces of your answer?

6 A Yes.

7 Q When someone who is creating a new legislative

8   district map is trying to get as equal population

9   distribution through the districts as possible,

10   will that affect other factors in redistricting?

11   For example, the traditional redistricting

12   factors?

13 A It can and usually does.

14 Q Which of the traditional redistricting factors can

15   and will be affected by achieving equal population

16   through the districts?

17 A Well, again, let me answer in two parts. First,

18   it can implicate all of them because in an effort

19   to get population equality you may well be in a

20   position where you have to give something up on

21   one of the other principles. But there are many,

22   many ways to draw districts with equal population

23   and so there will almost always, in fact, I think

24   I can state that without the qualifier, there will

25   always be alternative configurations that may do a

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1   better job at meeting the requirement of equal

2   population while also showing adherence to the

3   other traditional redistricting principles.

4 Q I think you mentioned one of the other factors a

5   person drawing a legislative district map needs to

6   consider is compliance with federal law, yes?

7 A That's correct.

8 Q And in referring to the federal law that one must

9   comply with, is that primarily the Voting Rights

10   Act?

11 A Correct.

12 Q Are there others of which you're aware?

13 A There may be, but in my experience with

14   redistricting the Voting Rights Act is by far the

15   most significant. There are constitutional

16   requirements, the 14th Amendment perhaps.

17 Q Sure.

18 A But the one that in my experience most map drawers

19   keep in mind is the Voting Rights Act.

20 Q What are the two sections of the Voting Rights Act

21   that one must primarily consider in drawing new

22   legislative districts?

23 A Well, there are two sections only one of which

24   applies in Wisconsin. Section 5, when the Voting

25   Rights Act was passed, applied to certain areas of

Page 15

1   the country based on the registration rates and I

2   believe turnout rates that had occurred in

3   previous presidential elections. In those states,

4   which is primarily the states of the deep south,

5   some parts of New York City and then Arizona and

6   some counties in California, these jurisdictions

7   must get any change to voting practices

8   pre-cleared by the justice department. There's an

9   office of voting rights compliance I believe is

10   what it's called that must approve these changes

11   before they go into effect. Section 5 does not

12   apply in Wisconsin, but there is another section,

13   Section 2, which has been amended several times,

14   that prohibits things like vote delusion and

15   prohibits practices that have the effect of

16   denying certain protected classes of voters from

17   an equal opportunity to elect candidates of choice

18   which has generally been construed as prohibiting

19   practices that have the effect of diluting the

20   voting power of African American voters, Latino

21   voters and other language minorities. Those are

22   the two major sections.

23 Q When we're talking about diluting the voting power

24   of a minority, what are some of the ways that that

25   can occur when we're talking about drawing a new

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1   legislative district map?

2 A Well, the two most common are known as packing and

3   cracking. Packing occurs when you have very large

4   concentrations of minority voters, say African

5   American voters, in one district. If a district

6   is composed of high concentrations, the votes of

7   some of those members of that community or that

8   voting population are wasted in the sense that

9   they're not necessary to provide for an equal

10   opportunity to elect candidates of choice and

11   through an alternative district configuration it

12   would normally be possible to draw districts in a

13   different way that provided additional

14   opportunities in other seats, other districts.

15   The other common strategy is what's known as

16   cracking where you distribute minority populations

17   so that they constitute a relatively small

18   percentage of voters in a particular district that

19   are insufficient to provide for an opportunity to

20   elect candidates of their choice.

21 Q If someone were interested in making a claim that

22   a particular legislative district map violates

23   Section 2 of the Voting Rights Act, what would

24   they need to show?

25 A Well, the main supreme court case that established

Page 17

1   the --
2   MR. POLAND: I want to interject
3   one objection here. I'll object to the
4   extent that it calls for a legal conclusion.
5   You can answer, Dr. Mayer.
6   THE WITNESS: Okay.
7 A In *Thornburg v. Gingles*, which was the main case
8   that interpreted the 1982 amendments to the Voting
9   Rights Act, they established a three-part test
10   which are commonly known as the prongs of the
11   *Gingles* test. The first thing you have to do is
12   show that a minority community is sufficiently
13   large and compact to allow for a district to be
14   created. The second is that you must show that
15   that community is politically cohesive. Third,
16   you must show a pattern of what's called racially
17   polarized voting in which members of the voting
18   community tend to vote for candidates that share
19   the same characteristics and that white voters
20   tend to be more supportive of white candidates and
21   less supportive of minority candidates. Then
22   there is additional evidence under the totality of
23   circumstances test that involve evidence that the
24   minority community is disadvantaged in some way
25   and does not have an equal opportunity to

Page 18

1   participate.
2 Q Professor Mayer, you have written a few opinions
3   that have been submitted in the case with which
4   this deposition is connected; is that right?
5 A That's correct.
6 Q In order to provide those opinions in those
7   reports, is it necessary for you to have a good
8   working knowledge of *Thornburg v. Gingles*?
9 A Well, not in terms of the legal conclusions
10   because the questions that I addressed are more
11   empirical questions.
12 Q So you wouldn't necessarily hold yourself out as
13   an expert on how *Thornburg v. Gingles* might
14   interpret in any given legislative district map?
15 A Well, I believe I could describe the outlines, but
16   typically in a landmark supreme court decision
17   there are many, many elements. I believe I'm
18   conversant in the major ones involving the
19   conditions in which analysis is required to
20   support a claim under that part, under Section 2.
21 Q Fair enough. I would like to go through the
22   prongs. To the extent that you're conversant with
23   them, then perhaps you can provide some answers.
24   If you don't feel like you're sufficiently
25   conversant to answer my questions, let me know.

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1   That will be fine. Let's look at the first prong.
2   You mentioned that that involves showing that
3   there's a sufficiently large minority population;
4   that they be I believe large enough to form a
5   majority in a single seat district?
6 A That's a common way of envisioning it.
7 Q Is there a different way of envisioning it?
8 A Well, as I think about it, I believe it requires
9   being able to draw a district that has a majority
10   of the minority population.
11 Q Have you ever heard of the *Thornburg v. Gingles*
12   prongs being referred to as a threshold test?
13 A Yes.
14 Q What's your understanding of what that means?
15 A My understanding of that is that that's a
16   condition that you must meet in order to proceed
17   but that it doesn't end the analysis.
18 Q So just because you meet those three prongs of
19   *Gingles* doesn't mean that you have proven a case
20   of voter discrimination under the Voting Rights
21   Act?
22 A That requires a legal conclusion that I don't
23   think I'm prepared to make.
24 Q That's fair. The *Gingles* factors, those come into
25   play in the context of someone challenging a

Page 20

1   district map that currently exists, yes? Let me
2   just see if I can clarify the distinction I want
3   to make. I'll tell you how I look at this, and
4   then you can tell me if I'm on the right track or
5   wrong track.
6 A Okay.
7 Q On the one hand you have circumstance where a
8   legislature or court needs to draw a district map
9   so they're looking prospectively at what needs to
10   be done and they know they need to comply with the
11   Voting Rights Act when they do that. On the other
12   hand is someone looking back retrospectively at
13   the map that's been drawn and saying that does not
14   comply with the Voting Rights Act. Do the *Gingles*
15   factors -- do those generally come into play when
16   you're looking back at a map that's been drawn and
17   you're trying to show that map does not comply
18   with the Voting Rights Act?
19 A Again, that calls for a legal conclusion. I would
20   simply say that I believe in both instances -- in
21   the case of the map drawers, that careful map
22   drawers would be cognizant of that as they drew
23   the map and would make an effort to comply with it
24   if they concluded that it was applicable.
25 Q Let's look at it from the context of someone

Page 21

1 challenging a map for a moment. We're looking at

2 whether the first prong can be satisfied. Is it

3 enough to show that the population is large enough

4 to constitute a majority in a single seat district

5 or do you need to show that the population is

6 large enough that they can form a majority in more

7 single seat districts than the map actually

8 provides for?

9 A I would say it depends. It depends on the

10 concentrations that exist in those districts and

11 the size of the minority population. I don't

12 think I can give you an absolute rule about when

13 it applies and when it doesn't. Much will depend

14 on the context.

15 Q And what would the context be?

16 A It would depend on a judgment as to whether the

17 concentrations of minority voters were sufficient

18 to elect candidates of choice and whether they

19 could be reduced or it was necessary to increase

20 them. So you couldn't necessarily say that this

21 map creates X number of majority-minority

22 districts and that's sufficient. If it were

23 possible to create more, that could be one part of

24 a claim. But, again, it depends on the size of

25 the minority concentrate population, the degree to

Page 22

1 which it is compact and geographically

2 concentrated and the concentrations of that

3 population in the districts that were drawn.

4 Q Fair enough. Let's use a very simple example just

5 for purposes of illustration. Let's say there's a

6 map that creates a single African American

7 majority-minority district and some people come

8 along and said Wait a minute. That doesn't comply

9 with the Voting Rights Act because there are a

10 sufficient number of minorities in that area, in a

11 compact area and contiguous area, that you could

12 create two African American majority-minority

13 districts. Is it necessary for them to show that

14 there would be enough to create that second

15 African American majority-minority district to

16 satisfy the first prong of *Gingles*?

17 A Well, again, with the qualifier that it depends on

18 the context, but that could well be -- I think

19 that would be part of the claim.

20 Q If they challenged that map that contained only

21 one African American majority-minority district

22 but they couldn't show that there were enough

23 members of that minority community to create a

24 second, would they have satisfied the first prong

25 of *Gingles*?

Page 23

1 A Well, there are actually a couple of issues going

2 on here. As I understand it, packing does not

3 necessarily have to be a voting rights claim. I

4 do understand that there is not a constitutional

5 or legal requirement to create an influence

6 district if you can't create an additional

7 majority-minority district, but that at the same

8 time that doesn't necessarily mean that the

9 district -- if you had one district with

10 100 percent minority population or say 80 percent

11 and you took 35 percent of that or 25 percent of

12 that population and stuck it into another

13 district, that wouldn't be a majority-minority

14 district. But as I understand it, the claim of

15 packing can be distinct from the voting rights

16 claim; that even though you don't have enough

17 minority voters to create a second

18 majority-minority district votes can still be

19 wasted.

20 Q Let me see if I captured correctly what you're

21 saying. So if there were not enough members of

22 the minority community to create an additional

23 majority-minority district, they would not be able

24 to make out a packing claim under the first prong

25 of *Gingles* although it might make out a claim

Page 24

1 under some other standard?

2 A I believe that's correct.

3 Q What would that other standard be?

4 A Well, again, there are some legal principles

5 involved. It might be an equal protection claim

6 or some other legal requirement that isn't

7 necessarily a part of the Voting Rights Act. I'm

8 in territory that I think requires more specific

9 legal expertise than I have.

10 Q So in this case would it be accurate to say that

11 you will not be offering an opinion on whether the

12 new district map enacted as Act 43 violates a

13 standard other than the Voting Rights Act with

14 respect to majority-minority districts?

15 A I'm not sure I understand the question.

16 Q That's fair. Let me do it again. You mentioned

17 there may be another legal standard that might be

18 violated by packing minority voters into a

19 district but you're not exactly sure what that

20 might be, fair?

21   MR. EARLE: Object to the form of

22   the question.

23 A As I sit here I can't drudge it up, but, yes, I

24 believe that's true.

25 Q If you meet the standards of *Gingles*, packing

1 could be a claim under the VRA, the Voting Rights
2 Act?
3 A That's correct. Let me just add that --
4 Q Please.
5 A -- the juris prudence is continually changing and
6   there may be decisions that have come down in the
7   last several months that would alter that
8   conclusion that I am not aware of or haven't seen.
9 Q This is the season for new decisions on these
10   issues, isn't it? All right. So as far as we sit
11   here today, your opinions or your reports opine on
12   the question of minority representation issues as
13   it relates to the Voting Rights Act but not some
14   other legal standard of which you're currently
15   unaware?
16   MR. POLAND: I'm going to object to
17   the form of the question and foundation too.
18 A I'll give a qualified yes to that because I don't
19   know that I have all of the information necessary
20   to make that judgment.
21 Q What information would you need?
22 A I would have to see if there were any changes that
23   have occurred since the time I wrote my report.
24 Q So the state of your reports right now at least is
25   that you address minority voting issues only in

25

1 terms of the Voting Rights Act; is that correct?
2 A I believe that's correct.
3 Q Let's move on to the second prong of *Gingles*. Can
4   you tell me again what that is.
5 A I believe that is that the minority group must be
6   politically cohesive.
7 Q What does it mean to be politically cohesive?
8 A Generally as an empirical matter that's expressed
9   through studying the voting behavior of groups and
10   whether they tend to support -- whether they have
11   the same interest and tend to support the same
12   types of candidates.
13 Q How do we determine that as an empirical matter?
14 A Well, generally the second and third prongs are
15   analyzed in concert through looking at the degree
16   of racially polarized voting and the degree to
17   which members of a minority community show support
18   for candidates who are members of that minority
19   community and the degree to which white voters,
20   most typically, although there are other
21   conditions, tend to support white voters and tend
22   not to support candidates who are members of
23   minority groups.
24 Q You mentioned that the second and third prongs are
25   generally considered together in terms of racially

26

1 polarized voting.
2 A I'm speaking of the empirics of it. Yes. Just in
3   terms of how you -- as a matter of analyzing the
4   votes to provide evidence. That's correct.
5 Q Would it be accurate to say that when you're doing
6   this analysis of the second and third prongs that
7   you're looking at the voting behavior of two
8   different groups, the minority group and the
9   non-minority group?
10 A Typically that's correct.
11 Q What are we looking for in terms of the voting
12   behavior of the minority group?
13 A The degree to which they -- well, there are a
14   number of issues that go into a determination of
15   political cohesion not all of which can be
16   expressed in terms of data. Some of it has to do
17   with views of people who are experienced in terms
18   of the political attitudes and behaviors of that
19   particular community, and that complements any
20   analysis that is conducted of voting behavior.
21   The reason voting behavior is important is it's
22   something that is easy to observe and more or less
23   objective.
24 Q Let's start with the voting behavior. How do we
25   gather data on voting behavior to assess whether

27

1 the minority community votes in a racially
2 polarized way?
3 A Well, there are a variety of ways to do it. It is
4   not a straightforward methodological question
5   because while we can observe the voting behavior
6   of groups of people at the ward level or at the
7   reporting level, we can't observe the behavior of
8   individual voters because we don't have the
9   ability to look at ballots and know the ethnicity
10   of the person who cast the ballot. This is a
11   problem that's known as ecological inference or
12   the ecological inference problem. It's one that's
13   been known for many decades, and there have been a
14   number of efforts to come up with a satisfactory
15   solution to the problems that are posed whenever
16   you are trying to make inferences about individual
17   behavior or groups of individuals when all that
18   you have to look at are aggregate data. The
19   methods that the court accepted in *Gingles* were
20   something known as -- there were three methods
21   that they looked at. One is something called
22   double regression or variously called Goodman
23   regression which is a way of conducting a series
24   of regression models that estimate the behavior of
25   minority and white voters. Another is known as

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1 homogeneous precinct analysis. So if I have a
2 ward, a reporting unit, that consists of
3 100 percent of white or minority voters, I know
4 with certainty that everyone who voted in those
5 districts was white and so we can make very clear
6 inferences about the composition or the
7 characteristics of the people who cast ballots.
8   Then the third is known as the method of
9 bounds. We don't have particularly in areas --
10 well, in Milwaukee there are not that many areas
11 that have 100 percent white or 100 percent
12 minority. There are some in the African American
13 community that the populations are very high,
14 concentrations are very high, and then you use a
15 method known as the method of bounds which is a
16 way of establishing upper and lower limits on what
17 the possible range of values can be. For a long
18 time that was the only way of making that
19 determination.
20   All of those methods have well-known flaws.
21 They often produce estimates that make no sense
22 and both statisticians and political scientists
23 have been looking for ways to improve upon that.
24 Q Have they found any ways of improving on that?
25 A Right now what is generally considered in

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1 political science to be the best method in the
2 sense that it's superior to the methods that had
3 been in existence up to that point is a method
4 developed by a Harvard political scientist named
5 Gary King which is a combination of a
6 generalization of the method of bounds looking at
7 data in a large number of precincts and also
8 applying different probability distributions that
9 estimate the likelihood that certain votes or
10 certain concentrations of votes will produce the
11 data that's observed. That's what I used.
12 Q Let's then back up just a half-step then and talk
13 a little bit more about the method of bounds. How
14 does that differ from the homogeneous precinct
15 analysis?
16 A Well, they are often done together. The
17 homogeneous precinct analysis typically requires
18 you to have a sufficient number of precincts that
19 are above 90 percent. That's kind of the rule of
20 thumb because as you approach minority or white
21 concentrations that get close to 1 or 0, the
22 precision of your estimates get better and a
23 bound -- if you look at a district or a ward that
24 is 50 percent white and 50 percent minority, the
25 method of bounds will be usually anywhere from 0

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1 to 1 which is not useful because it means that
2 just about any possible combination of votes can
3 produce the outcomes that you observe. As you get
4 closer to 0 or 1, those bounds get smaller.
5 Homogeneous precincts requires you to have
6 precincts that are homogeneous or wards that are
7 homogeneous, and that is useful because it tends
8 to produce relatively small differences between
9 the upper and lower bounds. But the method of
10 bounds can be used in precincts that are not
11 homogeneous with the understanding that the size,
12 the range of the upper and lower limits is going
13 to be larger.
14 Q So walk me through how you would do a method of
15 bounds analysis. Do you do this on a ward level?
16 Do you do it on a city, county level?
17 A Typically it's done at the ward level.
18 Q So you find wards and you figure out its
19 demographics, what the percentage of minority
20 versus majority population is?
21 A That's correct. Typically it's done in terms of
22 the voting age population.
23 Q How many wards do you need to get information from
24 before you can have the ability to have a
25 calculation in which you can have a high degree of

Page 32

1 confidence?
2 A Well, one of the problems with the method of
3 bounds is that I'm not aware of a method that
4 allows you to calculate confidence intervals. And
5 the number of wards -- the general practice would
6 be is that you would look at as many wards as you
7 could. I'm not aware that there's -- certainly
8 looking at just a single ward wouldn't necessarily
9 give you a great deal of information, but it
10 depends on the -- it would depend on the number of
11 wards that exist in a larger jurisdiction that
12 you're looking at and the relationship between the
13 wards and the concentration of minority voters.
14 Q How do you select the wards to look at?
15 A There are a number of different ways to do it. In
16 the case of the analysis that I did, I looked at a
17 number of different -- actually, let me back up a
18 little bit. What drives the decision is not
19 necessarily the number of wards that you need, but
20 what drives it is the races that you're looking
21 at. Not every race is appropriate for racially
22 polarized voting. You need to have a race in
23 which at least one non-minority candidate is
24 running against at least one minority candidate
25 because otherwise if all of the candidates are

1 members of a minority or all of the candidates are
2 white, you can't get any data on the degree to
3 which race plays a role in how people vote. So if
4 you're looking at an aldermanic district, you
5 might have a handful of wards. If you're looking
6 at a citywide district in Milwaukee, you might
7 have several hundred wards. If you were looking
8 at a congressional district, you might have --
9 again, it depend on the state. You might have
10 many hundreds of wards or several thousands of
11 wards. So it depends on -- the unit of
12 measurement is the ward, but the unit of analysis
13 is the race that you're looking at.
14 Q Let's just talk about the map created by Act 43
15 for a moment. That creates the assembly and
16 senate districts for the state of Wisconsin. If
17 we're looking at whether let's say the Milwaukee
18 area districts comply with the Voting Rights Act,
19 which wards would we look at and for what race
20 would we look at?
21 A Well, there are a number of different ways to do
22 it. I observed a number of different races some
23 of which are focused on the particular areas where
24 there are high concentrations of African Americans
25 and Latino voters. But you can also get useful

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1 A Again, it's possible, but given the concentration
2 of voters, of minority voters, as they're
3 distributed in Milwaukee, even a citywide or even
4 a countywide analysis would be most heavily
5 influenced by the behavior of voters that are in
6 those particular areas, minority voters in
7 particular, because that's -- of the 71,000 voting
8 age Latinos, a very large percentage of them live
9 in that particular area that is south of I94, and
10 most of them live, as I noted in my report, in
11 contiguous census blocks. It doesn't mean that
12 there aren't Latino voters elsewhere, but most of
13 them are in those areas.
14 Q The quality of data that you get from a particular
15 race, does that deteriorate as the population
16 you're analyzing gets further away from the
17 affected areas?
18 A It can. But, again, I'm confident that even in
19 the countywide race that for minority voters that
20 there will be no significant deterioration in the
21 quality of the inferences that you can make simply
22 because you're not adding a large number of
23 minority voters to the population that you're
24 investigating.
25 Q Is that what gives you the confidence, that factor

35

1 information by looking at a somewhat broader
2 spectrum of areas. You can get useful information
3 in a variety of different contexts, particularly
4 in a city like Milwaukee in which most of the
5 minority voters in the city, both African American
6 and Latino, tend to be concentrated in
7 relatively -- what's the word? Identifiable
8 areas. It's not as if African Americans and
9 Latinos are distributed uniformly across the city.
10 The African Americans tend to live, most of
11 them -- actually, it's not a tendency. We can
12 identify that most of the African American
13 population of Milwaukee lives in an identifiable
14 area and most of the Latino population lives in a
15 particular identifiable area. Not all of them.
16 But when you do a citywide analysis, you are still
17 investigating the voting behavior of most of the
18 Latinos or African Americans that are living in
19 those areas that would be covered by districts,
20 assembly districts, that were drawn in those
21 areas.
22 Q Is it better to look at races that are run in the
23 specifically affected areas where there's a claim
24 that there is a violation of the Voting Rights
25 Act?

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1 that you just mentioned?
2 A Well, confidence in the inferences that I have
3 made with regard to the voting behavior of
4 minority populations.
5 Q When you select a race to analyze to look for
6 evidence of polarized voting when you're doing the
7 method of bounds approach, do you include all of
8 the wards? Do you look at some of the wards and
9 say this one is not going to provide especially
10 useful information to me so we're going to set it
11 aside and not analyze it?
12 A Well, I can't answer that question because I
13 didn't use that method.
14 Q Okay. You used, I think you said, the King
15 method?
16 A Right. That uses all of the wards. It makes no
17 distinctions. I didn't look at the wards and say
18 I'm going to use this one but not that one because
19 it doesn't look like I'm going to get good
20 results. You use all of them, and what comes out
21 of that is an estimate of the percentage of
22 minorities and whites that voted for minority and
23 white candidates. And then probably one of the
24 most -- the two most important advantages or two
25 most important qualities of the EI method as it's

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1 known is it will always produce estimates of

2 percentages that are between 0 and 1 whereas the

3 method of bounds or in particular Goodman

4 regression or double regression will frequently

5 produce estimates that show that over 100 percent

6 of the voters voted for white candidates and a

7 negative number of minority voters. That can't

8 happen in EI because the mathematical properties

9 of the distributions that are used to estimate the

10 data are constrained to be between 0 and 1. But

11 the other quality is that the EI method produces

12 standard errors which you can use to investigate

13 the precision of those estimates. And to the

14 degree that the method of bounds or the use of

15 bounds are going to produce less precise

16 estimates, that will simply mean that the standard

17 errors of the final results will be greater.

18 There's much more to EI than just looking at the

19 method of bounds in every district and deriving

20 the estimate solely from that.

21 Q I might have gotten this wrong. I think you

22 described the ecological inference method as being

23 a combination of method of bounds and doing the

24 probability distribution. Does that get it right?

25 A Well, that's not quite right. It's more properly

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1 described as a generalization of the method of

2 bounds and using that data in a way that's not

3 typically done with the method of bounds and is

4 able to extract more useful information than

5 simply looking at the method of bounds because

6 what the -- and then overlaying on that a

7 distribution that fits with the data that's

8 observed whereas the method of bounds you simply

9 look at the number of votes that are cast for each

10 candidate, you estimate the number of voters from

11 each my minority group which you can't directly

12 observe and you try to fill in the internal cells

13 on that table. The method of bounds simply gives

14 you a range of what those values can be, and

15 that's where that method stops.

16 Q And that's where ecological inference picks up?

17 A That's a qualitative way of describing it that's

18 not completely correct. The EI model goes well

19 beyond simply looking at the numbers precinct by

20 precinct. It would be difficult to describe in

21 words, but I would say that the sources I provided

22 in the software will give you a better indication

23 of precisely how it works.

24 Q So at that point ecological inference becomes

25 really much more a question of math?

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1 A It becomes not simply math but a question of

2 trying to extract as much information as possible,

3 which the other methods miss, and using methods

4 that ensure that the results are meaningful in the

5 sense that they don't produce estimates that can't

6 be empirically true.

7 Q Let's look at it this way: Once you have selected

8 the races to analyze in performing the ecological

9 inference analysis, are there any other subjective

10 decisions that are made to complete that analysis

11 or is it simply a matter of applying an objective

12 process to that data?

13   MR. POLAND: I'm just going to

14 object to the form of the question.

15 A Well, there are certain decisions in terms of

16 different variants of or different methodological

17 decisions that can be made.

18 Q What would those be?

19 A There are some variants of EI that allow you to

20 utilize non-election data or other co-variate of

21 voting behavior. There are different variants

22 of the -- the basic model applies to a two-by-two

23 table in which you have minority voters and white

24 voters and one minority candidate and one

25 non-minority candidate. There are also extensions

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1 that allow you to apply the model to larger tables

2 because usually you don't simply have white voters

3 and black voters or Latino voters. You also have

4 non-voters. Sometimes you have two white

5 candidates and two Latino or African American

6 candidates, and there is an extension, which is

7 what I used, that allows you to analyze somewhat

8 larger tables. That uses a slightly different --

9 in the two-by-two table the probability

10 distribution that you use to generate the

11 estimates is a bivariate normal, which is -- if

12 you think of a bivariate curve as a bell-shaped

13 curve, the bivariate normal would be that bell

14 curve rotated in three dimension so it looks like

15 a bell. The generalized method uses a different

16 distribution called the Dirichlet distribution

17 which is enormously complicated. The advantage it

18 has is that all of the parameters of that

19 distribution are between 0 and 1 which fits with

20 the need to have all of your estimates be between

21 0 and 1 because we're estimating the percentage of

22 voters that vote for a candidate which can't be

23 less than 0 or more than 100 or 1.

24 Q What did you call that variant?

25 A Generally that's called the -- in the literature

1 it's known as -- the base method of EI applies to
2 two-by-two tables. The variant is something
3 that's usually known as the R-by-C with R as the
4 number of rows and C as the number of columns.
5 There is software part of the package that's made
6 available for EI, which is all open source, that
7 will generate those estimates.
8 Q It sounded like there was a name.
9 A The R-by-C method is different because it uses a
10 different probability distribution to generate
11 those estimates. There isn't a subjective
12 determination that if I look at a particular race
13 I'm going to use all of the information available
14 for that race and I'm not going to toss anything
15 out because I don't think that it's going to be
16 helpful. So if I'm looking at the -- say in
17 Milwaukee looking at the races in the 8th assembly
18 district. If they meet the pre-conditions, which
19 is one minority candidate and one white candidate,
20 I'll use it. If I'm looking at the 8th or 12th
21 aldermanic districts, which are in the same area,
22 they meet the criteria, I use them and I use all
23 of the available information. I don't arbitrarily
24 toss out or actually not even arbitrarily. I
25 don't toss out information unless it's unusable
                           41

1 which sometimes occurs.
2 Q Under what circumstances would the data be
3 unusable?
4 A If nobody voted in a precinct, if a ward -- if we
5 were not able to generate data in which we had
6 confidence that the census figures for the
7 population of that district were correct. But
8 those would be the only types of circumstances in
9 which that would occur.
10 Q If there is a race that has let's say one minority
11 candidate and more than one non-minority
12 candidate, how does that affect, if at all, this
13 analysis?
14 A You will still be able to generate -- the goal is
15 to generate an estimate of the percentage of
16 minorities and whites who vote for on the one hand
17 the minority candidate and on the other the white
18 candidate. In a case like that sometimes the
19 white candidates are collapsed into a single
20 category. Sometimes they're not. Sometimes you
21 produce both estimates. They typically won't
22 differ by much. The only time you would really
23 see that would be in a primary where you have
24 multiple candidates running. Most of the time by
25 the time you get to the general election you will
                           42

1 have only two candidates.
2 Q So the method that you employed did not -- let me
3 try that over. The method that you employed
4 considered all non-minority candidates as being
5 one for purposes of this analysis in any given
6 race?
7 A I'm just trying to think of the -- I believe I
8 collapsed them, but I'm not 100 percent sure. I
9 would have to go back and look at the original
10 data. Most of what we looked at or of what I
11 looked at were general election races where that
12 was not a problem although I think there were a
13 couple where there were multiple candidates. But,
14 again, the literature is pretty clear that that
15 usually doesn't make a significant difference
16 especially since I don't think we had any races
17 where we had multiple candidates in each category.
18 But, again, I have to go back and confirm that.
19 Q Could you tell me a little bit about the
20 literature that suggests that having multiple
21 non-minority candidates doesn't have an affect on
22 the racial polarization analysis. Let me just
23 tell you what my question is here. It kind of
24 bounced around in the back of my mind. It seems
25 to me that in any given election you're going to
                           43

1 have a certain number of people who vote but don't
2 really know a whole lot about the candidates and
3 there's going to be some measure of scattering
4 simply because they go in and they say this name
5 rings a bell and they vote for that person. If
6 there are more non-minority candidates -- if
7 there's more than one, wouldn't that raise the
8 possibility that the vote is not necessarily due
9 to a racial polarized influence but something
10 else?
11 A It's possible, but as I understand the -- again,
12 I'm not a lawyer. In terms of the understanding
13 that I have in how to implement that that it
14 doesn't matter what the other factors are; that
15 the main one is simply whether members of a
16 minority group vote for candidates of that --
17 again, you can analyze them in terms of I talked
18 about Gwen Moore running and she -- in one of her
19 races she ran against a white candidate and a
20 significant number of whites voted for her. She
21 was an incumbent. Milwaukee is a democratic city.
22 You can explain that. You still saw a
23 significantly larger percentage of African
24 American voters vote for her than white voters.
25 Q That's a good example. Let's just carry through
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1   on that just on the methodological basis. So the

2   ecological inference method of determining whether

3   there is racially polarized voting does not

4   account for other potential influences on the vote

5   like partisan makeup of the electorate?

6 A That's correct.

7 Q Is there any way of backing that out of the

8   analysis?

9   MR. EARLE: I'm going to object to

10   the form of that question. Backing out?

11   MR. KELLY: Controlling for it.

12   Better?

13   MR. EARLE: Yes.

14 A There may be. I'm not aware of any. I would have

15   to say I'm not aware of any.

16 Q So when we look at the results of an ecological

17   inference analysis of racially polarized voting,

18   would it be fair to say that we can't tell how

19   much of that is attributable to the partisan

20   makeup of the electorate?

21 A That's possible. But my understanding of how the

22   supreme court looks at it, that doesn't matter.

23   It doesn't matter why -- the question is the

24   degree to which members of a minority community

25   will vote for the minority candidate and members

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1   of the white voters will be unwilling to vote for

2   the minority candidate. It's true that there are

3   a lot of factors that go into that, but as far as

4   the finding of racially polarized voting, what

5   matters is the ultimate voting decision and the

6   degree to which that is associated with the racial

7   composition of voters and the racial

8   characteristics of the candidates.

9 Q So would it be fair to say that your understanding

10   of the supreme court cases is that it does not

11   matter whether the members of the electorate are

12   voting for a person because of their race or

13   because of their party affiliation in determining

14   whether there's racially polarized voting going

15   on?

16   MR. EARLE: Form objection.

17   MR. POLAND: Join.

18 A I believe that's true. It certainly was the case

19   in *Gingles*. There may have been other district or

20   appeals court decisions in which they did take

21   that into account, but --

22 Q Just out of curiosity, do you know if there is a

23   degree of correlation between minority status of a

24   voter and his party affiliation?

25 A Yes.

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1 Q What is that correlation?

2 A Well, African American voters tend to be

3   overwhelmingly democratic. Latino voters tend to

4   be strongly somewhat less overwhelmingly

5   democratic. And that's consistent across the

6   country.

7 Q You mentioned earlier, and I think I got this

8   right, you mentioned earlier that as part of the

9   second prong of *Gingles* in addition to looking at

10   voting behavior you could also look to the views

11   of people who are experienced and the political

12   attitudes and behaviors of that community to

13   determine if there is racially polarized voting

14   that occurs.

15 A No. That would be one piece of evidence that you

16   could use to reach a conclusion about whether that

17   community was politically cohesive.

18 Q All right. And let's just follow up on that for a

19   moment. What types of people would we be looking

20   to to find out if that minority community is

21   cohesive?

22 A If I were to do it, I would look for people who

23   had deep roots and experience in the community,

24   people who had run for office in the community,

25   people who had been involved in different groups

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1   in the community. Not everybody -- in the case of

2   the Latino areas, not everybody who is Latino is

3   going to know a lot about that community just

4   because they share the same ethnic

5   characteristics. But that would be one piece of

6   information that could be useful.

7 Q Did you do any research on those kinds of people

8   who would be able to provide that kind of insight

9   into the minority communities with respect to the

10   African American community?

11 A Did I do any of that research?

12 Q Yes.

13 A My analysis was restricted to the data, so, no, I

14   did not talk to people in the community as part of

15   my report.

16 Q And that is true both with respect to the African

17   American community and the Latino community, yes?

18 A I had somewhat more familiarity with the Latino

19   community based on earlier work that I had done in

20   the Milwaukee aldermanic. But, no, I did not

21   speak with anybody for the purposes of gathering

22   data in order to conduct my analysis.

23 Q Would it be accurate to say then that your --

24   well, let me back up. Did you conclude that the

25   African American community is politically

Page 49

1 cohesive?

2 A Based on their voting behavior I did.

3 Q Did you conclude that the Latino community is

4 politically cohesive?

5 A Based on their voting behavior I did.

6 Q You mentioned work that you did with respect to

7 Milwaukee aldermanic districts. What was that

8 work?

9 A I consulted. There was no litigation, but I

10 consulted with Voces de la Frontera in attempting

11 to -- not attempting to. I did draw some notional

12 aldermanic districts that took into account growth

13 in the Latino population over the previous ten

14 years. Let me add to that that both of the

15 districts, the 8th and 12th, which comprise much

16 of the area in the 8th and 9th are both currently

17 represented by white males on the common council.

18 Q What did Voces ask you to do in your consultations

19 with them on the Milwaukee aldermanic districts?

20 A They asked me if it would be possible to draw

21 aldermanic districts, they had different

22 population requirements and different numbers,

23 that would create a district with a majority

24 population of Latinos. But that's not really

25 information that I used in the reports that I did

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1 for this litigation.

2 Q That's fair. Were you able to draw any aldermanic

3 district maps that created majority Latino

4 populations?

5 A Yes.

6 Q How many?

7 A I believe one.

8 Q In drawing that map, were you looking at Latino

9 voting age population or Latino citizen voting age

10 population?

11 A At that point I don't believe I looked at citizen

12 voting age population. Let me correct that. I

13 did look at citizen voting age population, but the

14 analysis that I did was less formal than it was in

15 this case.

16 Q In which aldermanic district was it that you were

17 able to create a Latino majority?

18 A It's been a long time. I actually don't recall.

19 Q Do you happen to recall what the percentage of the

20 Latino voting age population was in that district

21 that you created?

22 A I'm afraid I don't.

23 Q Do you remember what the Latino citizen voting age

24 population was in that district you created?

25 A I do not.

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1 Q Do you know if you had a goal in mind for what

2 percentage you thought would be necessary to have

3 either Latino voting age population or Latino

4 citizen voting age population?

5 A I believe -- I'm working on recollection because I

6 haven't looked at this in six months. I believe

7 my goal was to create a district with a majority

8 of the citizen voting age population.

9 Q Do you recall what your benchmark was for the

10 majority? Was it a bare majority? Was it

11 60 percent?

12 A I don't remember.

13 Q You mentioned that as part of that consultation

14 that you were looking at the growth of the Latino

15 population over the past ten years; is that

16 correct?

17 A No. I was simply looking at the census data from

18 2010. I knew that the population had grown, but

19 those growth patterns themselves were not

20 something that I took into account. I was working

21 simply with the 2010 census data.

22 Q And you knew the Latino population had grown by

23 comparison with the 2000 census data?

24 A That's correct.

25 Q Do you have any experience in projecting

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1 demographic growth?

2 A Not specifically, but the tools are not that

3 complicated or magic. No, I did not do any of

4 those projections.

5 Q You didn't do any of those projections for the

6 work you did for Voces in the Milwaukee aldermanic

7 districts?

8 A That's correct.

9 Q Did you do any of those kinds of projections in

10 your work with respect to Act 43?

11 A I did not.

12 Q So would it be fair to say that in this case you

13 won't be offering any expert opinions on

14 projections in the growth of minority communities?

15 A Not entirely. I will be offering opinions about

16 my view of Dr. Morrison's work.

17 Q Let's move to the third prong of *Gingles*. And, as

18 I recall you saying, the second and third prongs

19 are generally considered together?

20 A As an empirical matter that's correct.

21 Q The second prong, though, is generally looking at

22 how the minority community votes and the third

23 prong looks at how the non-minority community

24 votes?

25 A That probably is applying too stark a distinction.

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1 But the key in the third prong is an assessment of
2 whether minority voters have an equal opportunity
3 to elect candidates of choice, and that requires
4 looking both at voting behaviors of minorities and
5 the voting behavior of non-minorities.
6 Q Let's do this: Give me your best summary of what
7 you believe the third prong of *Gingles* to require.
8 A My understanding of the third prong is that given
9 a particular district composition that white
10 voters voting as a block will tend to vote in a
11 way that prevents a minority community from
12 electing a candidate of their choice which can
13 happen even in a majority-minority district if the
14 minority population is not sufficiently large.
15 Q How would that happen in a majority-minority
16 district?
17 A Well, it's well established that white voters are
18 more likely to register and more likely to turn
19 out, and that can overwhelm in the sense that it
20 can more than compensate for having a small
21 majority of minority voters. So typically a
22 majority-minority district requires more than just
23 a bare majority in order to be considered an
24 effective majority-minority district.
25 Q To meet the third prong of *Gingles* is it necessary

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1 to demonstrate that historically the non-minority
2 electorate has been able to frustrate the minority
3 community's ability to elect a candidate of
4 choice?
5 A Not necessarily because it's possible under an
6 existing district configuration that minority
7 communities have been able to elect candidates of
8 choice but that they would have less of a chance
9 under a new configuration. So the fact that
10 District 8 has been represented by a Latino
11 assembly representative for the last I believe
12 eight years does not mean that if you change that
13 district, reduce the concentrations at areas that
14 are not part of the existing Latino community,
15 that you will continue to be able to do so.
16 Q We'll get to that a little bit more later. I'm
17 thinking more in the conceptual aspect of the
18 third prong of *Gingles* when it talks about the
19 voting behavior of the non-minority population
20 acting in such a way that it frustrates the
21 minority community's ability to elect a candidate
22 of choice. What I'm wondering is to satisfy that
23 prong do you need to show, actually make a
24 showing, that historically and empirically that
25 the non-minority community has in fact frustrated

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1 the minority community's ability to elect a
2 candidate of choice?
3   MR. EARLE: Form objection.
4 A It depends on the context. In a given
5 jurisdiction or a community there are going to be
6 a number of different races. In the case of the
7 8th district it has been represented by a Latino
8 candidate, but there are other races in that area
9 in which you do see patterns of racially polarized
10 voting which have either resulted in the election
11 of white candidates or patterns that are
12 sufficiently large that they could result in that
13 pattern extending to the assembly races. So while
14 that would be one piece of the totality of
15 circumstances, I would not regard the fact that a
16 district had elected minority candidates as
17 evidence that they would continue to do so under
18 alternative configurations. In racially polarized
19 voting the analysis does not require that the
20 minority candidate lose. You can still get useful
21 information and estimates of the voting behavior
22 when minority candidates win. The key is to apply
23 that to alternative configurations where you may
24 be adding white voters to say a district or
25 reducing the concentration of minority voters.

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1   I'm going to need to take a break in a little
2 bit if that's okay.
3 Q One more question here. I think a break would be
4 a good idea. When we're looking at -- we will get
5 into the 8th district in a little more detail
6 later. I'm glad you brought that up now because
7 it gives a good reference point for the question.
8 When we're looking at whether a district engages
9 in racially polarized voting and the race that
10 we're using to make that analysis extends beyond
11 that district, would it be more accurate or would
12 you get a more accurate picture of racially
13 polarized voting if you looked only at the wards
14 within that district?
15 A Probably. I've actually done that analysis. I
16 did it after I submitted my report, but it's in
17 the materials that I produced. If I recall
18 correctly, it shows a degree of racially polarized
19 voting that's at least as high as what you see in
20 the other races.
21 Q So that analysis is not in the reports but it's in
22 the materials that you have produced here today?
23 A That's correct.
24   MR. KELLY: All right. Let's take
25 a break.

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(Recess)

Q Professor Mayer, thank you for the time you took in walking me through the three prongs of *Gingles*. I want to move on now. If I recall, we had referred to those three prongs as a threshold; is that right?

MR. POLAND: Object to the form of the question.

A I believe that's correct.

Q So even though you can show all three prongs, that in and of itself does not constitute a violation of the Voting Rights Act. You need to take another step.

A Well, I considered it a threshold as something that you must meet in order to make a voting rights claim. I don't know that I would agree that you need to do other things once you have met that. But I do think it's true that if you can't meet those thresholds then there's an issue.

Q That's fair. One of the other things that you had mentioned as being part of the Voting Rights Act claim was this idea of the totality of the circumstances. Do you recall that?

A Yes.

Q Can you tell me what that is.

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A That was another part of the decision that --

Q I'm sorry to interrupt. The decision is the *Gingles* decision?

A The *Gingles* decision that talks about other types of evidence that would suggest that members of the minority community face disadvantages in their ability to participate. And as I understand it, as someone who looks at this empirically, it's another piece of evidence that is considered in reaching a conclusion or finding that minority populations or other protected classes under the Voting Rights Act are denied an equal opportunity to elect candidates of choice.

Q I understand that any time that a test is referred to as the totality of the circumstances it's subject to some degree of amorphism. Do you know what kind of circumstances are considered in that totality of the circumstances test?

A I don't know that I can give a comprehensive list, but among the things that would be taken into account are participation rates, whether a minority group is disadvantaged in terms of education, socioeconomic status, patterns of discrimination. I'm sure there are others that suppress or -- suppress is probably not the right

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word -- that reduce their participation and their ability to participate in the political process. And, actually, let me add one more with respect to the change in Wisconsin law, I think it's likely that the voter ID laws will have an impact, a particularly hard impact, on minority communities in Milwaukee.

Q What is it that the totality of the circumstances test is trying to discern?

A Again, my understanding is that it's one piece of information that goes into the ultimate finding or conclusion that minority populations or protected classes are denied an equal opportunity to elect candidates of choice.

Q Would it be fair to say that if that's what we are trying to find out if it exists that we are looking at state actions that would cause that to occur?

A Not necessarily.

MR. EARLE: Form.

Q Why not?

A Because things like education and low income wouldn't necessarily be the result of state action. There may be state actions that could be implicated in that finding, but, again, my

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understanding is looking at this as a social scientist not as a lawyer or a legal scholar. But many of the factors are not due to any particular state action. By state if you mean government --

Q Government.

A Right.

Q Thank you. State in political science terms.

A Understood.

Q If what we are trying to do is find out if there has been a violation of the Voting Rights Act, how would non-state actions play into that determination?

A Well, the factors that go into things like turnout and registration are fairly well understood. Registration is a state action, but it is not so in the sense that people who are poor who don't have significant amount of formal education and so forth are less likely to participate than people with higher incomes and higher levels of education. So that can play a role as well.

Q Let's say for the sake of our conversation this afternoon or this morning yet -- let's say that it is true that --

MR. EARLE: I'm going to retroactively insert an objection on the

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1 grounds that he's asking for a legal
2 conclusion as to the role of state action.
3 Go ahead.
4 MR. KELLY: Let's see if I can
5 remember where I was at.
6 MR. EARLE: I apologize.
7 MR. KELLY: Don't worry. That's
8 fine.
9 Q Let's say for the sake of our conversation this
10 morning that minority populations do register to
11 vote at a rate lower than non-minority
12 populations. Registration of course is something
13 that the state requires in order to vote; is that
14 correct?
15 A Correct.
16 Q The ability to register to vote is not impacted by
17 whether you're a minority or a member of a
18 non-minority population.
19 A Not directly.
20 Q Indirectly?
21 A Indirectly because there are certain factors that
22 make you less likely to register.
23 Q The factors that make you less likely to register,
24 are those things that the state has done?
25 A Some of them can be.

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1 Q Like what?
2 A Well, for example, a requirement that you register
3 well in advance of an election places a burden on
4 people to pay attention and to take action long
5 before. It can be up to 30 days. The location
6 and the ease with which you can register and the
7 documents that you need in order to register. So
8 I draw a distinction between the specific steps,
9 legal steps, that you must take in order to
10 register which are primarily a function of some
11 type of state action and the factors that make
12 people more or less likely to get to the point
13 where they decide to take those steps. That can
14 be a function indirectly of the stringency of that
15 state action but it's more of a factor of the
16 socioeconomic characteristics and the engagement
17 that the people have with politics and government,
18 and that's less of an issue of direct or often
19 will not be a function of direct state action.
20 Q Did I hear you say that the more significant
21 issues that play into whether someone participates
22 in the electoral process are those that come from
23 socioeconomic situation rather than the process of
24 say registration?
25 A Well, in terms of the affect on the likelihood of

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1 voting?
2 Q Uh-huh.
3 A I think that's true. There have actually been
4 studies that estimate the affect of what an
5 additional few years of education or being
6 older -- just to give you one example, people
7 between the ages of 18 and 24 are much less likely
8 to register and vote because they don't have much
9 experience, they haven't developed a habit of
10 voting, many of them are at college and they're
11 sort of geographically mobile and so the
12 turnout -- the likelihood that you register and
13 vote goes up as you get older. It also goes up as
14 your income increases. It goes up as you get more
15 education. Some of those -- if we're comparing
16 turnout among 18-year-olds and turnout among
17 60-year-olds, you're going to see very large
18 differences. Another factor behind that is that
19 it's well established that members of minority
20 groups are less likely to vote, register and vote,
21 than members of non-minority groups, and much of
22 that has to do with differences in income and
23 education and other factors. If you had two
24 comparable people of comparable education and
25 income and age and one was white and the other was

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1 a member of a minority group, you wouldn't see a
2 large difference or perhaps not any significant
3 difference. But it's an empirical fact that
4 minority groups tend to be lower income with less
5 education than non-minorities.
6 Q And those socioeconomic factors, those are not
7 impressed by law?
8 MR. POLAND: Could you read back
9 the question?
10 (Question read)
11 A I think I understand.
12 MR. POLAND: I object to the form.
13 A I think I understand what you mean by impressed,
14 but I'm not sure.
15 Q Let me rephrase it then. Those socioeconomic
16 factors are not imposed by law?
17 A Generally no.
18 Q Is it important in looking at this totality of the
19 circumstances part of the Voting Rights Act
20 analysis -- is it important to look at those
21 factors that are imposed by law as opposed to
22 those that are not?
23 MR. EARLE: I'm going to object to
24 the form of the question to the extent you're
25 asking for a legal conclusion.

1	A	I believe that both need to be taken into
2		consideration.
3	Q	What significance on the question of
4		discrimination against minority voters do factors
5		have that are not imposed by law?
6	A	Well, if you have historical patterns of
7		discrimination by private entities, that's one
8		factor. I'm trying to classify things as either
9		state action or not state action. Again, I think
10		I'm going to simply state that things that are not
11		directly caused by state action can be part of the
12		totality of circumstances test. Again, a lot of
13		that reflects the difference between a Section 5
14		claim, which is not an issue here, and a Section 2
15		claim.
16	Q	And how would that differ between Section 5 and
17		Section 2?
18	A	Section 5 applies specifically to changes in
19		voting practices and procedures which are by
20		definition matters of state action whereas
21		Section 2 is an equal opportunity to elect
22		candidates of choice which is a broader set of
23		considerations not all of which -- well, many of
24		which do not implicate state action.
25	Q	Let's do this --

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1	A	Can I amend that answer?
2	Q	Yes.
3	A	Certainly the drawing of districts is a matter of
4		state action, so that could affect the ability.
5		The way the districts are drawn is not going to
6		have a significant affect or much affect on the
7		socioeconomic status of the people who live within
8		that district.
9	Q	And drawing the district lines is not going to
10		make any given individual more or less likely to
11		register to vote.
12	A	By itself no, but it would certainly change the
13		characteristics of the groups or the number of
14		people in the district who have registered to vote
15		and who vote. It would not consider the district
16		itself as an independent variable that will have a
17		strong affect on whether an individual decides to
18		register.
19	Q	So regardless of where that district line is, the
20		individual could still decide to register or not
21		register. It's up to him.
22	A	That's correct.
23	Q	And he could still decide to vote or not to vote.
24		It's up to him.
25	A	That's correct.

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1	Q	For purposes of the analysis that you did, let's
2		divide the state action from the non-state action.
3		Let's look at first the African American
4		community. I'm sorry. We should probably back up
5		one step. Did you do a totality of the
6		circumstances analysis with respect to the African
7		American community and the Latino community?
8	A	I did with respect to the Latino community. I do
9		not recall doing a specific totality of
10		circumstances analysis other than to note the
11		lower likelihood of registering and voting.
12	Q	For the African American community?
13	A	Right. That was indirect. But I did do that
14		specific analysis for the Latino community.
15	Q	Is there a reason that you didn't do a specific
16		analysis for the African American community?
17	A	No.
18	Q	Looking at the Latino community, let's distinguish
19		between state action versus non-state action in
20		the totality of the circumstances analysis. What
21		state actions did you consider with respect to the
22		Latino community in the totality of circumstances
23		analysis?
24		MR. POLAND: I'm going to object to
25		the form of the question to the extent that

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1		it calls for a legal conclusion about what is
2		or is not state action.
3		MR. EARLE: Join.
4	A	I would say that the major part of that -- I
5		didn't conceive of my analysis as incorporating
6		that distinction, but sitting here now I would say
7		that -- again, we have to draw a distinction
8		between action that affects the propensity to vote
9		or the likelihood of voting and state action that
10		has the affect or can have the affect of denying
11		an equal opportunity. Those are two different
12		things. I would say that in terms of the ability
13		to cast a ballot formally, things like voter ID is
14		likely to have an affect because there's
15		substantial evidence that members of minority
16		groups are less likely to possess the
17		identification necessary to vote and less likely
18		to be able to get access to the documentation
19		necessary to obtain that identification. And as
20		far as the equal opportunity which is the more
21		collective aspects of drawing a district that does
22		not have sufficient concentration of eligible
23		minority voters would constitute a form of state
24		action that could implicate voting rights.
25	Q	Let's pick up on the last one first. Drawing a

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1   district that has an insufficient population of
2   minority voters. That's not going to affect their
3   ability to cast a vote, right? It my affect their
4   ability to elect a candidate of choice, but they
5   can still vote.
6 A Right. That's correct, but I don't think that's
7   the question at issue.
8 Q What is the question at issue?
9 A Whether they have an equal opportunity to elect
10   candidates of choice.
11 Q Let me make sure. I heard you make two
12   distinctions, and I might have gotten them wrong,
13   with respect to state action factors. You
14   mentioned those that affect the propensity to vote
15   versus those that deny the equal opportunity to
16   vote; is that correct?
17 A That's correct.
18 Q And voter ID, which one did you put that one in?
19 A I would characterize that in the second category,
20   the state action category.
21 Q The state action category that speaks in terms of
22   denying the equal opportunity to vote?
23 A Well, in the specific case of voter ID that's one
24   conclusion, yes, because my own analysis suggests
25   and research done by others suggests that it will

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1 A I believe that's correct.
2 Q The studies that you have considered in forming
3   your opinion on the affect that Wisconsin's voter
4   ID law might have, in the other states that had
5   those voter ID laws did they allow for all of
6   these types of documents to suffice to get an
7   identification card sufficient to vote?
8   MR. EARLE: Object to the form of
9   the question.
10 A I'm not completely and fully informed about the
11   specifics of all of the other states in terms of
12   how to obtain ID that allows you to vote. I do
13   know that Wisconsin's law is considered one of if
14   not the strictest in the country in terms of what
15   documents you must present at the poling place in
16   order to vote. I'm less sure about the
17   requirements to obtain an ID in other states that
18   have voter ID laws such as Indiana, Georgia or
19   that have strict voter ID laws, Idaho.
20   MR. KELLY: I think we need to
21   change the tape. Shall we go ahead and do
22   that?
23   (Recess)
24 Q Professor Mayer, before we went off the record for
25   the break we were talking about the affects that

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1   have a specific and larger impact on minority
2   voters.
3 Q Have you studied Wisconsin's voter ID law?
4 A Yes, I have.
5 Q What are the types of documents that someone needs
6   to have to get a photo ID sufficient to vote?
7 A I believe it is a birth certificate and a social
8   security card.
9 Q Are there any others that would suffice to get a
10   photo ID capable of allowing you to vote?
11 A I believe a baptismal certificate may suffice, but
12   I don't believe there is an exception that allows
13   for an affidavit from a third party.
14 Q Is it your understanding then that a birth
15   certificate, a social security card or baptismal
16   certificate are the only forms of documents that
17   will suffice to obtain a voter ID card that would
18   allow you to vote?
19 A If you had a driver's license from another state
20   or some other document that established your
21   identity but wouldn't suffice for ID for voting,
22   presumably that would work as well.
23 Q So if you had a driver's license from another
24   state, you could get something that would allow
25   you to vote in the state of Wisconsin?

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1   Wisconsin's voter ID law might have on minority
2   turnout. Do you recall that?
3 A Yes.
4 Q You mentioned that this could have an affect
5   because members of minority groups are less likely
6   to have the documents necessary to get a photo ID;
7   is that right?
8 A Mostly because they are less likely to have one of
9   the forms of ID that are required to vote such as
10   driver's license, a state ID, a passport, military
11   ID, et cetera.
12 Q Why would minorities be less likely to have one of
13   those forms of identification?
14 A If you don't have a car, you don't need a driver's
15   license. If you are low income, you're less
16   likely to have a passport. Passports are
17   expensive and they're only necessary for
18   international travel. There have been a number of
19   studies both in Wisconsin and in other states,
20   particularly Indiana, that find a consistent
21   pattern of significant disparities in the
22   percentage of voting age whites that have the
23   necessary documents and the percentage of
24   minorities who have those documents. Let me be
25   clear in speaking of forms of identification it's

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1 what's necessary in order to vote and the
2 foundational documents are those that are
3 necessary to obtain a form of identification
4 necessary in order to vote.
5 Q Just so I make sure I understand what you're
6 saying, are you saying that the studies show that
7 not only are minorities less likely to have the
8 specific forms of identification necessary to vote
9 and that they are less likely to have the
10 foundational documents necessary to get the voter
11 identification card?
12 A Well, let me see if I can be precise. I do
13 believe there is evidence that they are less
14 likely to have the foundational documents and will
15 have a tougher time obtaining them if they don't
16 have them. In terms of the disparities, I think
17 what I can say is that it is a disparity in
18 possession of the forms of ID necessary to vote.
19 Q Do any of the studies to which you have referred
20 establish that minorities are less likely to have
21 birth certificates, social security cards,
22 baptismal certificates or driver's licenses?
23 A Driver's licenses, yes. The others there may be.
24 Sitting here I can't state whether they also show
25 that.

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1 A I believe my understanding is that my ability to
2 testify at trial would be on issues that -- that
3 it would have to be related to the reports or in
4 the rebuttal reports. There would have to be a
5 connection.
6 Q Have you seen any evidence in the state of
7 Wisconsin that minorities are less likely to have
8 birth certificates, social security cards or
9 baptismal certificates?
10 A Not at this point.
11 Q I think this is what you said earlier. Correct me
12 if I'm wrong. In Wisconsin under the voter ID law
13 you can obtain a photo ID if you have a birth
14 certificate, social security card or baptismal
15 certificate; is that correct?
16 A I believe so. I'm not sure precisely what
17 combination, but you need to have documents that
18 establish your identity and citizenship. I would
19 imagine that a passport and a certificate of
20 naturalization would -- a foreign passport and a
21 certificate of naturalization would also suffice.
22 Q Do you know if there's any cost to get that photo
23 ID in the state of Wisconsin?
24 A It is free although you have to ask for it. It's
25 not offered. My understanding is that the DOT

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1 Q There's nothing in the reports that you have
2 submitted in this case that suggests that
3 minorities are less likely to have a birth
4 certificates, social security cards or baptismal
5 certificates?
6   MR. EARLE: Object to the form of
7   the question.
8   MR. POLAND: Join.
9 A Can you state that again?
10 Q You have not opined in your reports on whether
11 minorities are less likely to have birth
12 certificates, social security cards or baptismal
13 certificates.
14 A You are correct that I have not submitted
15 anything. I don't want to say yes to a no
16 question or no to a yes question.
17 Q Thank you. Good clarification. And you don't
18 intend to offer any opinion at trial on whether
19 minorities are less likely to have birth
20 certificates, social security cards or baptismal
21 certificates?
22 A Well, that depends on what happens at trial. I
23 can't answer that question with certainty.
24 Q What would have to happen at trial for you to
25 offer an opinion on that issue?

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1 made a decision, policy decision, that they would
2 not tell people it was free but if you asked and
3 said that you didn't want to pay for it they would
4 give it to you.
5 Q Do you know if that policy still stands today?
6 A I don't.
7 Q In the studies to which you have referred
8 suggesting that minorities are disproportionally
9 affected by the requirement to have a photo ID to
10 vote, do you know if they were studying all
11 minority populations or citizen minority
12 populations?
13 A In the case of African Americans it's a
14 distinction that doesn't really matter. In the
15 case of Latino populations I would say that it
16 looks at the overall population, but I could be
17 incorrect about that.
18 Q So when these studies have looked at Latino
19 communities, you don't know whether they made a
20 distinction between citizens and non-citizens?
21 A That's correct. But if someone is here legally,
22 they can obtain a driver's license. In a sense
23 any disparity would be less than the overall --
24 you can have a driver's license even if you are
25 not eligible to vote.

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1 Q Do you know if the studies have made a distinction
2   between the minority voting age population versus
3   those who are not of voting age?
4 A I believe they're restricted to voting age
5   population. In most states the age for obtaining
6   a driver's license is 16 but the voting age is 18
7   although I believe there are some states that have
8   a higher age requirement. I believe these studies
9   are limited to the voting age population.
10 Q Let's move away from *Gingles* for a little bit. I
11   believe you mentioned that in the state of
12   Wisconsin, at least for state assembly and senate
13   districts, there is a requirement that they be
14   compact?
15 A That's correct.
16 Q What is compactness?
17 A It is a measure, and there are a number of
18   different measures -- the best way to describe it
19   is it's a measure of the regularity of the shape.
20   A perfectly compact shape is something like a
21   perfect circle or a perfect square or a perfect
22   polygon. That describes an ideally compact shape.
23 Q What are the different measures of compactness?
24 A There are probably 20.
25 Q Let me just stop you there. Why so many?

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1 A Because each of them measures different things.
2   Just to give you one example, one measure of
3   compactness is the ratio of the longest axis of a
4   district to the shortest axis of a district and
5   that tells you whether a district is elongated,
6   thin on one dimension and thick on the other.
7   There are other measures that compare the district
8   to a regular shape, typically a circle, that is
9   the smallest circle that can completely surround
10   the district or the area of the circle with the
11   same perimeter of a district. There are a number
12   of others that often have names associated with
13   them, Popper, Roeck and so forth, but they are all
14   designed to assess the degree to which the shape
15   of the district is regular.
16 Q In looking at the regularity of the shape, are
17   there different factors to the regularity that
18   different tests try to describe?
19 A In a sense, yes. So the X and Y measure, which is
20   not commonly used because it misses a lot -- some
21   of them depict the degree to which a district is
22   spread out. Some of them measure the relationship
23   between a district and an ideal shape. There are
24   different measures that attempt to capture
25   different aspects of shape.

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1 Q You mentioned there may be as many as 20 different
2   types of measurements. Do they fall into
3   different kinds of categories according to what it
4   is they're trying to capture in their analysis
5   with respect to compactness?
6 A I believe they do.
7 Q What would those categories be?
8 A Well, categories would be comparison to a regular
9   shape, the relationship between the area of a
10   district and its perimeter and measures that
11   attempt to capture elongation. I don't think I
12   could give you a comprehensive list of all of the
13   different classifications.
14 Q Is it possible that there are as many different
15   classifications as there are tests?
16 A I don't think that's true because I think there
17   are a number of tests that share common features
18   and attempt to measure similar elements.
19 Q What are the most common categories of compaction
20   tests that are used?
21 A I think the ones that are most commonly used are a
22   test that's called a minimum circumscribing circle
23   which is you take a district that could be of any
24   shape and you draw the smallest perfect circle
25   around it that contains every part of the district

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1   and you compute the area of the district and the
2   area of that circle and you take the ratio. So a
3   value closer to one would indicate a more compact
4   shape. Values closer to zero would be a less
5   compact shape. Another is called -- it's a
6   variant of a perimeter test which is you measure
7   the perimeter of a district and then you draw a
8   circle with the same perimeter and again you
9   calculate the area of the district and the area of
10   that circle and you take the ratio. Those are the
11   two that I use most often because I find them most
12   useful in both characterizing and conceiving of
13   the relationship between the district and a
14   regular shape.
15 Q So the ones you most commonly use are the minimum
16   circumscribing circle and then the variant of the
17   perimeter test that you just described?
18 A That's correct.
19 Q What other commonly used tests are out there?
20 A I don't know that I could name them. I listed
21   some in my report. Most of them are variants of
22   these kinds of things. Some of them use hexagons.
23   Some of them use different shapes as comparison.
24   But sitting here I'm not able to recall all of the
25   different measures.

81

1 Q What is the single best test to measure

2   compactness?

3 A I do not think there is consensus that there is a

4   single best way --

5 Q Why not?

6 A -- or a single best measure.

7 Q Why is that?

8 A Because the different measures of compactness

9   measure different things.

10 Q Did we go over the different things that they

11   measure?

12 A Yes.

13 Q So the things we have already talked about?

14 A Right.

15 Q Is it important to try to capture all of those

16   different things the different tests are trying to

17   measure?

18   MR. EARLE: Object to the form.

19 A Within reason I suppose, yes. I don't think it's

20   necessary to calculate every possible measure.

21 Q Is there a specific name for the second test that

22   you used, the variant of the perimeter test? Is

23   there a specific name for that? I just want to

24   know for ease of reference.

25 A I think it's either called the Roeck test,

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1   R-o-e-c-k, or Popper.

2 Q For our purposes today, and I won't hold you to

3   this at trial or anything, but can we refer to it

4   as the Popper test?

5 A I think the Roeck test is probably better.

6 Q Roeck?

7 A Yes.

8 Q We'll do Roeck. So we have the minimum

9   circumscribing circle and the Roeck test. How

10   many of the different things that the various

11   compactness measures try to capture do those two

12   tests capture?

13 A One of them captures the relationship between the

14   district and a regular circle shape.

15 Q That's the minimum circumscribing?

16 A Yes. And the other one, and, again, I'm not sure

17   it's called the Roeck test, captures the

18   relationship between the length of a perimeter of

19   the district and the degree to which it's a

20   regular shape.

21 Q Are you familiar with anything that captures

22   dispersion?

23 A Yes.

24 Q What would that be?

25 A I believe that would be a perimeter to area test.

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1   That a district with a very large perimeter but a

2   very small area would be a district that was

3   spread out in terms of having parts of the

4   district that are far away. There are also more

5   complicated measures that try to estimate what you

6   might call the central moment or the geographic

7   center of a district and the distance between that

8   center and the most distance part.

9 Q Do either the minimum circumscribing circle or the

10   Roeck test capture dispersion?

11 A They can. A district that's more dispersed will

12   require a larger circle to encompass it and will

13   also constitute a smaller fraction of the area of

14   that circle.

15 Q To the best of your knowledge what is an

16   acceptable range of compactness?

17 A There's no particular threshold.

18 Q So how does one determine if a district is too

19   compact or compact enough?

20 A Well, I don't know that there would be any such

21   thing as a district that was too compact.

22 Q After I said that I kind of -- yes. Let's try

23   that one again.

24 A Okay.

25 Q How would one determine if a district is

84

1   insufficiently compact as opposed to permissibly

2   compact?

3 A It's a subjective determination because although

4   the term compactness is used in statutes and

5   constitutions, I'm not aware of any legal

6   requirement that it meet a particular threshold.

7   In a series of supreme court decisions in the '90s

8   and 2000s about dealing with racial

9   majority-minority districts in congress, in

10   several cases the supreme court overturned

11   districts because in the view of Sandra Day

12   O'Connor or another justice they were simply

13   bizarrely shaped. There were a number of

14   districts that you look at them and they are well

15   known in the redistricting community as

16   constituting districts that were overturned.

17   Again, it's subjective determination.

18 Q Who gets to make the subjective determination of

19   whether a district is sufficiently compact?

20   MR. POLAND: Object to the form of

21   the question.

22   MR. EARLE: Join.

23 A Well, there are a number of elements to that

24   question. Initially the person who decides

25   whether a district is compact is the person or

1 persons who drew the map. And then ultimately I
2 suppose it could be up to a judge to determine
3 whether a district was sufficiently non-compact
4 that it failed to meet the legal requirement.
5 Q And legal requirement being what exactly?
6 A That it be compact.
7 Q But without being able to point to any particular
8 measurement describing what would be sufficiently
9 compact?
10 A I don't believe that there's any bright line
11 standard or threshold.
12 Q Do you know whether courts defer to legislatures
13 more with respect to what they consider to be
14 sufficiently compact versus when a court is in the
15 first instance drawing a district map?
16 A I have an idea, but I think that calls for a legal
17 conclusion that I'm not prepared to give.
18 Q So you would not say that that's in your area of
19 expertise?
20   MR. POLAND: Object to the form of
21   the question.
22 A Well, in terms of the specific differences between
23 the degree of deference that a court grants a
24 legislature and the different views a court might
25 take of compactness when it's reviewing a

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1 legislative plan or whether it's drawing its own
2 plan? I would say that particular fine point is
3 not something that I'm an expert on.
4 Q When considering compactness, is it important to
5 look at the map as a whole as opposed to
6 individual districts?
7 A It depends.
8 Q What does it depend on?
9 A There may be -- looking at a map as a whole if you
10 looked at an average measure of compactness by
11 calculating the compactness measure for each
12 district and taking the average. That would give
13 you some idea. But, again, there would be -- you
14 would have to also look at particularly districts
15 because I think it would be certainly possible for
16 a map that had an overall compactness score of X
17 or Y to have a certain number of districts that
18 were so bizarrely shaped that they would be
19 considered insufficiently compact.
20 Q Do you know if the acceptability of a compactness
21 measure is influenced by any of the other
22 traditional redistricting principles?
23 A Yes.
24 Q What would that relationship be?
25 A Well, it would depend on natural boundaries. Any

86

1 district that you drew in Door County is going to
2 be non-compact because it's bounded by water and
3 it's a point that extends several hundred miles.
4 It depends on whether a district is bordered by
5 some body of water or some other irregular
6 boundary like a state boundary that might be a
7 straight line such as the border between Wisconsin
8 and Illinois. It would be somewhat harder when
9 you're looking at districts that border Minnesota
10 or the Upper Peninsula. Of course it would vary
11 depending on how population is distributed. It
12 would depend on how local political subdivisions
13 are configured. There are a variety of things
14 that would need to be taken into account that
15 would have an affect on how compact a particular
16 district is.
17 Q So in doing the compactness analysis it's
18 important to account for all of those different
19 issues you just identified.
20 A The reason I'm hesitating is I want to make sure
21 that I accurately understand taking into account.
22 It would be --
23 Q Let me put it this way: In doing the most
24 accurate compactness analysis possible, is it
25 important to control for those issues that you

87

1 just described that could affect the compactness
2 of a district?
3 A It could be, yes.
4 Q Is that important in Wisconsin?
5 A It could be. It depends on what districts you're
6 looking at and what measures you're looking at.
7 Yes. I can see that it could be.
8 Q When you looked at the compactness of districts in
9 Wisconsin, did your analysis control for all of
10 those issues that you just mentioned?
11 A No.
12   MR. POLAND: Objection. Object to
13   the form.
14   THE WITNESS: I'm sorry.
15 A No.
16 Q Why not?
17 A I was interested in doing a comparison. I suppose
18 it was partially a matter of time and the
19 compactness measures of districts -- those reports
20 are fairly simple to generate. It would be a much
21 more labor intensive matter to identify and place
22 the districts into different categories depending
23 on some of those other factors.
24 Q Did you do any kind of a difference of means
25 calculation for compactness across the state of

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1 Wisconsin?

2 A I did not.

3 Q Why not?

4 A Because one of the things that I looked at
5   was the -- the analysis that I did looked at the
6   most compact districts and the least compact
7   districts. The one variable I looked at was the
8   party of the incumbent who represented that
9   district after 2010. The analysis that I did
10   didn't require a difference of means test which
11   would be required if you were comparing say
12   overall means. Let me add to that that I know
13   Professor Gaddie did conduct that analysis, a
14   difference of means test, and it showed that there
15   was no statistically significant difference in
16   compactness between democrat and republican
17   districts in the senate. But I believe it did
18   show a statistically significant difference
19   between democratic and republican districts in the
20   assembly.

21 Q Do you know if he then performed any analysis that
22   controlled for those non-partisan type of issues
23   that could affect the compactness of a district?

24 A He did not. He performed a multiple regression
25   analysis that looked only at incumbency, but he

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1   did not include any independent variables such as
2   bordering on water or anything else that in my
3   view a proper multiple regression analysis should
4   have included.

5 Q Do you know what his regression analysis was
6   trying to identify?

7 A I believe he was trying to identify whether there
8   was a difference between democratic incumbents and
9   republican incumbents to see whether districts
10   represented by republicans were more or less
11   compact than districts represented by democrats.

12 Q Did that analysis show that there was any
13   correlation between lack of compactness and
14   partisan affiliation of the incumbent?

15 A I would have to look at the report, but in my
16   view -- and, again, let me preface any criticism
17   of Professor Gaddie. I know you went through this
18   in his deposition. He's a friend of mine.

19 Q Yes.

20 A We get along very well. We have a rule that
21   nothing that happens in here is taken personally
22   by either of us.

23 Q And he has said the same of you.

24 A I don't think he did that analysis correctly and
25   so I don't think that even if it did show a

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1   difference or that it didn't show a difference I
2   would not regard that as definitive.

3 Q What was wrong with that analysis?

4 A Too many excluded variables of the type that we
5   were talking about. There's a well-known problem
6   in regression that any omitted variables that are
7   going to be correlated in any meaningful sense
8   with the dependent variable will cause the
9   regression analysis, the coefficient estimates, to
10   be biased and incorrect.

11 Q Do you know what that analysis would have shown if
12   he had included those other independent variables?

13 A I do not.

14   MR. KELLY: Doug, it's noon.

15   MR. POLAND: Yes.

16   MR. KELLY: Do you think lunch is

17   here?

18   MR. POLAND: It was supposed to be

19   here sometime between 12:00 and 12:15, so it

20   may very well be.

21   (Recess)

22 Q Professor Mayer, this morning we were talking
23   about the Voting Rights Act and equal population
24   and a little bit about compactness all as they
25   relate to how one draws a map in terms of it's a

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1   good map versus a not good map. I would like to
2   turn now for just a little while to what you
3   mentioned as the traditional redistricting
4   factors, and, recognizing that we have already
5   dealt with compactness, what are the traditional
6   redistricting factors of which you're aware?

7 A Well, again, this is not necessarily a
8   comprehensive list. I've got equal population,
9   contiguity, compactness, respect for local
10   political subdivisions, maintaining communities of
11   interest, adhering to other principles, key
12   principles of federal law. I would like to add
13   two others that I didn't mention this morning
14   which is preserving core district population so
15   that you don't shift populations unnecessarily,
16   and, in the case of a state like Wisconsin that
17   has staggered senate elections, to disenfranchise
18   a minimum number of voters who in Wisconsin when
19   they're moved from an even to an odd senate
20   district they lose their -- they wind up not being
21   able to vote in the 2012 elections.

22 Q Just one last point on compactness. We were
23   discussing that in terms of the state legislative
24   districts, the assembly and the senate districts,
25   and I think you noted that compactness is a

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1   constitutional requirement for those districts; is

2   that right?

3 A I believe so.

4 Q That's not true of the congressional districts,

5   though; is that right?

6 A It's not a federal constitutional requirement.

7   Without look at the state constitution I can't say

8   definitively whether that's a state constitutional

9   requirement. I'm most familiar with the state

10   legislative.

11 Q Then when we're looking at congressional

12   districts, would it be fair to say that

13   compactness falls within that category of

14   non-constitutional traditional redistricting

15   factors?

16 A Again, without having the constitution in front of

17   me, I can't say definitively. But if it's not

18   there, it is still within the ambit of principles

19   that are normally taken into account when drawing

20   a map.

21 Q With respect to compactness in terms of

22   congressional districts, do you know if there are

23   any statutes that require that those districts be

24   compact?

25 A In the state of Wisconsin?

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1 Q Well, anywhere in the country addressing

2   congressional districts.

3 A Well, I know there are statutes, federal statutes,

4   that require house districts to be single member

5   which has been around since I believe the middle

6   of the 19th century. It's possible because I know

7   that there are state laws that implicate the

8   drawing of congressional districts such as in Iowa

9   that they require congressional districts as much

10   as possible to be comprised of whole counties and

11   also prohibit map drawers from looking at

12   political data or incumbency residence. So I

13   would say it's entirely possible and in fact I

14   would say based on that that it's probable that

15   states have their own process for drawing

16   congressional districts because that like state

17   legislative districts is a process that is

18   typically performed by state legislatures or

19   bodies that the legislature designates as having

20   that authority. In California they did it by

21   referendum establishing an independent commission

22   and in Arizona too.

23 Q Let's step through this just a little bit more

24   slowly. Are you aware of any federal statutes

25   that require congressional districts to be exact?

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1 A I'm not.

2 Q Are you aware of any Wisconsin statutes that

3   require congressional districts to be exact?

4 A Again, I would have to look at the constitution to

5   be certain.

6 Q So there may be. So what you're telling me is

7   that it's possible the constitution might have

8   something to say about the compactness of

9   congressional districts?

10 A Yes.

11 Q You would have to see the constitution?

12 A I know that there are principles that have guided

13   federal courts in determining whether a district

14   was insufficiently compact or bizarrely shaped. I

15   don't know whether that's a particular statute or

16   whether that is something that's derived from a

17   different constitutional claim.

18 Q But as you sit here today in putting to one side

19   for a moment what the Wisconsin constitution might

20   say about congressional districts, you're not

21   aware of any Wisconsin state statutes that require

22   that congressional districts be exact.

23 A Today I'm not aware of any, but I can't say that

24   there aren't.

25 Q That's fair. Let's talk about communities of

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1   interest. Let's start here. What is community of

2   interest?

3 A A community of interest is a particular area or

4   population that shares some type of common

5   interest. There are a number of things. It could

6   be economic, cultural, environmental, political,

7   industrial. Just some common thread that links an

8   area as having some type of identifiable interest

9   or set of interests.

10 Q Is there a list of communities of interest that we

11   can find anywhere for the state of Wisconsin?

12 A I don't believe so.

13 Q How does a community of interest factor into

14   creating a legislative district map?

15 A Well, the idea is that districts are supposed to

16   maintain communities of interest and not

17   unnecessarily split them or arbitrarily split them

18   into different districts so that they have some

19   coherence to their relationship of that area of

20   that community of interest and their

21   representative.

22 Q So a bad map would split too many communities of

23   interest perhaps?

24   MR. EARLE: Form.

25   MR. POLAND: Join the objection.

1 A It's difficult to say because there are many
2   different ways to devise a map and other things
3   being equal -- most of the time it's difficult to
4   make other things being equal. A map that
5   maintains communities of interest would, other
6   things being equal, be preferable to a map that
7   does not.
8 Q When we assess a district map for how faithfully
9   it maintains communities of interest, what are the
10   steps that we go through in doing that?
11 A Well, the first step is to identify what you
12   consider to be communities of interest. There is
13   no bright line definition. It could be an area
14   that has interconnected economic relationships or
15   an area with a particular demographic
16   characteristic or an area that had been or cities
17   or areas that had been connected for a sufficient
18   time to forge a community of interest. You would
19   then look at the map and see what the map does to
20   what you have identified as communities of
21   interest.
22 Q When we assess whether a map faithfully adheres to
23   protecting communities of interest, is there any
24   way of determining how many communities of
25   interest that are not kept whole that creates a
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1   assembly districts were drawn largely on the basis
2   of county lines. As of 1959 the entire city laid
3   within Wood County, which was one assembly
4   district or might have been two assembly
5   districts, and this was before the reapportionment
6   decisions. So in that case I think you could make
7   an argument that the city of Marshfield and the
8   surrounding areas constituted a community of
9   interest and also a political subdivision that
10   under Act 43 was split and split in a rather
11   strange fashion where a portion of the
12   southeastern part of the city was carved out from
13   the suburbs all of the way to downtown.
14   You could also make a case that the central
15   part of Wisconsin, the area of Wausau and Stevens
16   Point and areas around there, have similar
17   economic and agricultural interests and that that
18   would be an area that you would want to pay
19   attention to and not unnecessarily split it. As I
20   said before, there's no bright line definition of
21   what constitutes a community of interest. It
22   could be port city and a surrounding area. It
23   could be a number of different things.
24 Q Is it possible for one geographic spot to be a
25   part of more than one community of interest?
99

1   problem?
2   MR. EARLE: Object to the form of
3   the question.
4 A So are you asking if there's a threshold, a
5   number, that you must stay beneath in order to
6   meet some criteria?
7 Q I think Peter is right. I object to the form of
8   the question too.
9   MR. EARLE: I welcome you joining
10   me.
11   MR. KELLY: I join.
12 Q Let's look at it this way: If a map does not
13   respect communities of interest, that is to say it
14   splits that community of interest; is that right?
15 A Yes.
16 Q How many split communities of interest would be
17   too many?
18 A Well, it's a contextual issue.
19 Q What's the context?
20 A Well, the context is -- let's take a city like
21   Marshfield which is a relatively small city but
22   has some identifiable economic and industrial
23   commonalities, and, as best as I can determine,
24   the city of Marshfield has been in the same
25   assembly district since at least the 1950s when
98

1 A Yes.
2 Q And is it possible that those various communities
3   of interest of which that one geographic spot is a
4   part would not necessarily all have the same
5   boundaries?
6 A It is certainly possible, but generally a
7   community of interest may very well be the type of
8   designation or the type of concept that doesn't
9   have strictly defined boundaries.
10 Q That's fair. Is it possible that in maintaining
11   one community of interest in which a geographic
12   spot is a part it would necessarily split a
13   different community of interest of which it is a
14   part?
15 A Well, again, it depends on context. It depends on
16   how long those areas have been together and
17   considered a community of interest. I suppose you
18   could carve up a map any way you wanted and make a
19   claim that the way that you have done
20   it constitutes a community of interest by
21   identifying what you think are the common factors
22   that link together the areas as you have linked
23   them. So there's more to it than just deciding
24   that you have created a community of interest. I
25   would say it's a bit more nuanced and it depends
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1 on factors that include the views of the people in
2 the community and how they see the representative
3 structure and the relationships that they have
4 built up.
5 Q That's a nice segue into my next question which is
6 who gets to decide what a community of interest
7 is, and, if there are competing claims to that
8 geographic spot by differing communities of
9 interest, who decides which is the more
10 significant and therefore more worthy of not being
11 split?
12 A Well, that's a difficult question to answer
13 because while it's true that different people,
14 different stakeholders, might have different views
15 of what a community of interest constitutes, I
16 think in many cases you would be able to assess
17 which of those claims was more persuasive. But it
18 would depend on an assessment of what people in
19 the community thought. There may be some clearly
20 identifiable economic or environmental interests
21 that you could identify.
22   Obviously the people in Act 43 who made those
23 decisions were the people who drew the map. They
24 were the ones who decided which communities of
25 interest and to what degree they would try to keep

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1 them together, but that doesn't mean that those
2 were the right decisions and I identified some
3 areas in my report where I think my conclusion is
4 that they made poor decisions.
5 Q I like the way you put that. In your opinion they
6 made some poor decisions. Is that different from
7 making a wrong decision?
8 A It can be. If those decisions were not consistent
9 with traditional redistricting principles, you can
10 make a claim or make an argument as I did that
11 that conflicts with that and that that decision
12 should not have been made. So there's a poor
13 decision and a wrong decision. Those may be the
14 same thing.
15 Q Is there any distinction between a poor and a
16 wrong decision in deciding what communities of
17 interest ought to be preserved?
18 A Well, I guess I would need to know more precisely
19 what you meant by wrong decision.
20 Q Well, that's what I'm trying to figure out from
21 you. What I'm looking for is some kind of a
22 standard that we can say here are the types of
23 characteristics where a legislature, a court,
24 simply may not split a community of interest. It
25 would be a wrong decision to do that. Can we

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1 identify a standard like that?
2   MR. POLAND: I'm going to object to
3   the form of the question.
4   MR. EARLE: Join.
5   MR. POLAND: If you understand, you
6   can go ahead and answer.
7 A It would depend on the degree to which that
8 decision was necessary in order to achieve another
9 goal such as equal population or respecting
10 municipal subdivisions.
11 Q Or any of the other traditional redistricting
12 principles?
13 A Correct. But those traditional redistricting
14 principles are not accorded equal weight. In the
15 case of Marshfield, my argument is that this a
16 community that has some identifiable industries,
17 healthcare, hospitals, some basic industry, and
18 that it had been kept in the same district for at
19 least 60 years and possibly -- I wasn't able to
20 find maps going back prior to 1950, but unless
21 there was some radical change in the way that
22 Wisconsin apportioned its assembly districts, it
23 may have been that way since the creation of the
24 state; that that's an important criteria to keep
25 in mind and that an area that had been kept

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1 together for that long ought not to be split
2 unless there was a very good reason.
3 Q I want to explore one comment you just made that
4 not all traditional redistricting factors are
5 accorded the same weight. Did I get that right?
6 A That's correct.
7 Q Is there a recognized hierarchy of importance of
8 those redistricting factors?
9 A Not really. There's no consensus list that --
10 other than equal population being at the top and
11 that you can't say this one is number four and
12 that one is number six.
13 Q Okay.
14 A There's no such agreement at least in political
15 science that I'm aware of.
16 Q For the sake of this part of the conversation
17 let's take equal population and compliance with
18 Voting Rights Act and we will set those aside.
19 A Okay.
20 Q We will talk about all of the other traditional
21 redistricting factors. You mentioned that they
22 are not all accorded the same weight. How do we
23 decide what weight to accord to each one of them?
24   MR. POLAND: Object to the form of
25   the question.

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1 A It's contextual and is based on -- when you begin
2   to draw a map, you make many, many decisions about
3   do you extend this district north? Do you extend
4   it west? Where do you start drawing the map?
5   There are all kinds of decisions that you make.
6   So in effect there are a very, very large number
7   of different permutations and combinations of
8   districts that you are able to draw. If you think
9   about the various criteria, you can't rank them in
10   an ordinal or in a cardinal rank that this is one,
11   two, three, but you can make some statements that
12   these are generally going to be more important
13   than others. What's written in the constitution,
14   the state constitution, for example. The factors
15   that you will place more weight on than others.
16   In terms of communities of interest,
17   generally the way that if I were drawing a map I
18   would make an effort to preserve those communities
19   of interest as I understood them and not
20   arbitrarily split places. And if I was in a
21   position where it turned out to be -- I felt it
22   was necessary to split that community or to split
23   a city in order to achieve some type of population
24   equality, I would probably back up and see if
25   there was another way to approach it in which I

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1   could draw districts that didn't require me to do
2   that or that didn't result in my doing that.
3 Q When you say that the relative importance of the
4   redistricting factors is contextual, is that just
5   another way of saying that it's subjective?
6 A Not subjective so much but contextual meaning that
7   it depends on the circumstances and the specific
8   facts that you're dealing with.
9 Q Let's take this as an example. You mentioned that
10   some of this will be impacted by where you decide
11   on the map to start drawing the districts, right?
12 A That's correct.
13 Q So as you build those districts, that's going to
14   have a dynamic affect on the next district to be
15   drawn; is that fair?
16 A I don't know if dynamic is the word that I would
17   use.
18 Q What word would you use?
19 A I would say that the affect is cumulative; that if
20   you start drawing a map in this place you will
21   make certain decisions because you will stop and
22   conclude that you have achieved a proper
23   population or sufficient population that's within
24   your goals for achieving population equality and
25   then you start drawing the next districts and the

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1   next district off of that and the decisions that
2   you make early in the process are going to affect
3   what happens throughout the process. So it's not
4   necessarily -- I guess dynamic is because I'm
5   thinking in terms of the descriptions of chaotic
6   systems in which small changes in the initial
7   conditions can produce major affects later on.
8 Q Is that the case here, small changes made in the
9   beginning can affect major changes later on?
10 A Well, certainly as a conceptual basis they can. I
11   don't know and it's not clear exactly what the
12   process that was used to draw the maps -- what
13   that process was and why certain decisions were
14   made. So I can't speak directly to what decisions
15   caused which effects. Some places I can. It's
16   very clear to me that at virtually every stage in
17   the process you have -- the decisions will branch.
18   You can decide to go off in one direction or go
19   off into another and maybe four or five different
20   decisions. And those decisions will have an
21   impact on what happens later on in the process.
22 Q This should be just a short diversion here. We
23   will get to your report shortly. In your report
24   you have opined on several of the traditional
25   redistricting factors for Act 43; is that correct?

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1 A Some of them, yes.
2 Q Have you attempted to draw a map for the entire
3   state of Wisconsin that would respect all of the
4   traditional redistricting factors in the way that
5   you weighed them?
6 A I have not, but I'm quite confident it could be
7   done.
8 Q Will you be doing that before the trial?
9 A No. I don't believe so.
10 Q And then we will back up and we will get back on
11   the main track here I think. You mentioned that
12   you have a way of weighting the traditional
13   redistricting factors. Some are, generally
14   speaking, always going to be more important than
15   others; is that fair?
16 A Yes. I can give an example.
17 Q What I would like to have you do if you could is
18   setting aside equal population and the Voting
19   Rights Act compliance, putting those to the side
20   for a moment, tell me generally how you weight the
21   remaining traditional redistricting factors in
22   relation to one another.
23 A Well, contiguity would probably be next in the
24   sense that every part of the district has to be
25   connected to the rest of the district. There are

1 certain exceptions, municipal islands and literal
2 islands that are in water. So there are a variety
3 of circumstances in which that contiguity is not
4 applied literally. I think compactness is
5 important and although, as I noted earlier,
6 there's no particular threshold of you do the
7 minimum circumscribing circle and you decide that
8 a .61 average is not high you have and it needs to
9 be .7 but you can look at a map and determine or
10 form an impression about which districts seem to
11 be oddly shaped and the degree to which that's
12 necessary. If you have a city that is very close
13 to an ideal population and you make a decision
14 that that's going to be one assembly district,
15 well, you're going to follow those municipal
16 boundaries and that's going to drive the decision
17 about what the district looks like, compact or
18 not.
19 Q After contiguity and compactness what do you
20   figure is --
21 A I would say respect for political subdivisions and
22   not unnecessarily and arbitrarily splitting those
23   subdivisions whether they are counties or
24   municipalities, townships or whatever. Respecting
25   communities of interest to the degree that you

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1 can. As you make those decisions, you need to be
2 cognizant and the relative importance that you
3 place would depend on how these decisions have an
4 impact on for example the number of people that
5 you move. So I would say preserving the core
6 district population is going to be in that mix as
7 well as well as the question of disfranchising as
8 few people as possible. That ultimate conclusion
9 might be complicated because you ultimately
10 wouldn't know how many people you have moved in
11 totality or how many people are disenfranchised
12 until you had completed the map drawing process.
13 But you can always go back and make revisions and
14 try again and in my experience that this is a
15 highly iterative process where you don't sit down
16 one afternoon and decide you're going to draw a
17 map and then 12 hours or three days later say here
18 it is. There's much more involved than that.
19   Can I add to my answer?
20 Q Please.
21 A Certainly the number of decision points is made
22   much, much larger when you are drawing the
23   districts based on census blocks in which there
24   are -- I don't know exactly how many there were in
25   the 2010 census, but it was on the order of half a

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1 million as opposed to the traditional practice of
2 using wards that were drawn by local governments
3 of which there are, again, depending on how you
4 count, between 3,500 and 4,000 populated wards.
5 Q In judging a map based on the preservation of
6   communities of interest, are we concerned
7   primarily with the number of communities of
8   interest that get divided or are we identifying
9   specific communities of interest in saying that
10   one there, that should not be divided. What is
11   the measuring stick?
12   MR. EARLE: Form.
13 A I don't think you can give a bright line answer to
14   that question. Certainly you want to preserve
15   them to the extent that you can and so rather than
16   saying okay here is my standard, I'm going to draw
17   a map and I'm not going to split more than ten
18   communities of interest, it's more a question of
19   looking at a map and reaching a conclusion that
20   says that doesn't look right. That doesn't look
21   like a defensible decision because it seems to
22   split an identifiable community of interest in a
23   way that doesn't seem to be required by a
24   different principle. So I don't think that you
25   can look at a map and identify a minimum number

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1 that gives you a safe harbor. It could be one,
2 and, if it was drawn in a way that wasn't
3 defensible, you might have to change that. You
4 wouldn't necessarily have to redraw the entire
5 map, but you would have to correct the
6 deficiencies that are found.
7 Q What would justify splitting a community of
8   interest?
9 A Well, in the case of a city if it was so large
10   that you could not contain it in a single assembly
11   or senate district, that would justify it. If
12   there was no other way to draw a district that
13   allowed you or that provided an opportunity to
14   meet one of the other redistricting criteria such
15   as contiguity or equal population. So there are
16   certain interests that could justify that, but it
17   would have to be based on some other principle
18   that you were trying to achieve when you do that.
19 Q Let's take a look at the question from a slightly
20   different perspective. Communities of interest
21   appear to carry a good deal of weight with you.
22   Would it be justified to privilege community of
23   interest over other traditional redistricting
24   factors such as, let's just pick one, core
25   preservation?

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1 A Again, it's difficult to give an answer to that
2   because it depends on the context in the sense of
3   where you are. The issue of communities of
4   interest is not going to arise with uniformity
5   throughout a state. But if you were drawing a
6   district and you were -- you typically draw the
7   district by starting at one edge and working
8   across as opposed to drawing districts in
9   different spots and then trying to converge. I
10   would think that a good deal of the time those
11   things would go together, particularly in a case
12   where a district had been represented by one
13   district for a good period of time which is not
14   the only factor but one of the factors that you
15   look at in reaching a conclusion about whether a
16   particular area constitutes a community of
17   interest. The two don't necessarily conflict.
18 Q Let's say that the map drawer looks at a
19   particular area and says well, you know, the
20   current map splits this community of interest and
21   we're interested in preserving that community of
22   interest so what we're going to do is we are going
23   to -- in the map we're going to put those two
24   pieces of the community of interest back together
25   again. Would that be okay to do even though it

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1   might adversely affect core preservation?
2 A Again, it depends entirely on the context. There
3   would be some circumstances in which that would be
4   a defensible decision. There would be other
5   contexts in which it would be less defensible. It
6   depends on a variety of factors that are external
7   to that particular decision, how that population
8   -- equal population, respect for political
9   subdivisions and so forth.
10 Q Let's say that they were able to respect equal
11   population, political subdivisions, comply with
12   the Voting Rights Act but the map drawer looked at
13   it and said I think it's more important to reunite
14   this community of interest rather than to preserve
15   the core of the old districts. Would that be a
16   legitimate choice to make?
17 A Well, again, I can't give a definitive answer. I
18   can easily envision circumstances where that would
19   be an appropriate decision.
20 Q Would that also be possible when it would
21   adversely affect the delayed voting metric?
22 A It's conceivable, but, again, it would depend on
23   the context.
24 Q Is there any way that you can identify all of the
25   factors that would tell me whether or not that

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1   would be a justifiable decision?
2 A Well, I can tell you what the factors you should
3   consider would be, but without reference to a
4   specific example it would be difficult to reach a
5   firm conclusion about whether that decision seemed
6   to be justified.
7 Q Tell me all of the factors that we would need to
8   consider.
9 A Assuming that equal population has been taken care
10   of, the nature of the political subdivisions, the
11   nature of the community of interest. Trying to
12   keep track of this in my head is a little tricky.
13 Q If you would like some note paper if that would
14   help you --
15   THE WITNESS: Is that okay?
16   MR. POLAND: Yes. Absolutely.
17   THE WITNESS: Okay.
18   MR. EARLE: Write neatly. He will
19   probably mark it.
20 A I'm not putting these in any particular order.
21   MR. EARLE: I don't want you to
22   struggle later and not be able to read it.
23   MR. KELLY: Thank you. I
24   appreciate that consideration.
25   MR. EARLE: It's totally for your

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1   convenience.
2   MR. KELLY: You're a good man,
3   Peter.
4 A Well, assuming that the final decision that you
5   reach is whether or not you were going to split a
6   community of interest, which could also be applied
7   to a decision about whether you're going to split
8   a municipality, I would look at the affect or the
9   relative balancing or what the affect would be on
10   other variables such as core district retention,
11   whether it had a significant impact on
12   disenfranchisement, whether it respected other
13   political subdivisions. Again, many of these
14   decisions are in fact subjective. There's no
15   checklist that you can go down and say you must
16   take care of this, this, this, this and in that
17   order. Again, at every point on a map you're
18   going to be faced with decisions about how you're
19   going to branch off and do other things. Again,
20   it's another way of saying that it's highly
21   contextual.
22 Q So the decision on how to privilege one of these
23   factors over another is going to vary from person
24   to person depending on who's drawing the map?
25   MR. EARLE: Form.

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1 A Well, I wouldn't necessarily phrase it that way

2 because -- of course different people may have

3 different ideas about the appropriate decisions

4 and the appropriate weight, and, to the degree

5 that politics enters into that -- we haven't

6 talked about that, but that's clearly one of the

7 factors that enters into the minds of the people

8 drawing the maps. It wouldn't vary so much from

9 person to person. It would be a decision about --

10 privileging is one way of stating it, but I would

11 think about it in terms of which of these

12 principles do you think is most important at any

13 particular point on the map in which you have to

14 make the next decision about which direction or

15 which areas or what you need to do.

16 Q Let's say for sake of our conversation that you

17 and Professor Gaddie were in a room drawing a map.

18 You mentioned all of these decision branches that

19 occur in the process of drawing a map and at one

20 particular point Professor Gaddie says *You know*

21 *what. I think it would be good to reunite this*

22 *community of interest even though it's going to*

23 *have an adverse affect on core preservation and*

24 *delayed voting* and you said *No. I disagree. We*

25 *need to give more weight to core preservation and*

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1 *delayed voting issues than reuniting a community*

2 *of interest.* Is there a way that we would be able

3 to tell if one of you was right and the other

4 wrong?

5   MR. POLAND: Object to the form of

6   the question.

7   MR. EARLE: Join.

8 A Well, in that situation, I don't think that would

9 be the end of the discussion. I think that would

10 be the beginning of a discussion of what the

11 community of interest is, the degree of the

12 impact. If we're talking about disenfranchising

13 15 more people as opposed to 15,000, that makes a

14 difference. So the way that I would attempt to

15 resolve that is try to be more specific about what

16 interests and principles are in play and what the

17 magnitude of the affects would be. Knowing in

18 this particular case that Keith and I get along

19 well, I suspect we would be able to reach some

20 consensus about what constituted a decision that

21 we regarded as defensible.

22 Q What if it was someone you didn't get along with

23 quite so well and you couldn't reach a consensus?

24 Would the two of you be looking at any objective

25 standards to help you determine which one of you

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1 got that next decision branch correct and which

2 got it wrong?

3 A Possibly.

4   MR. POLAND: Object to the form of

5   the question.

6   MR. EARLE: Join.

7 A Possibly. If there were very large differences in

8 the impact the different decisions that -- the

9 impact that this decision would have on some of

10 these other interests, I think you could make an

11 objective determination that doing it this way is

12 going to disenfranchise 10,000 people and result

13 in a district that is obviously non-compact and

14 doing it this other way results in far fewer

15 disenfranchised people that you might be able to

16 make a determination that you would be able to

17 show to a third party and have them say I think

18 one decision is better than the other and one

19 decision is indefensible and the other decision

20 is.

21 Q Well, that kind of gets to the nub of the

22 question. When you have a disagreement like that,

23 is it because one person has made a better

24 prudential decision or is it because someone just

25 went off the rails and made a wrong decision?

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1   MR. EARLE: I'm going to object to

2   the form of the question. I guess in

3   retrospect these are wildly incomplete

4   hypotheticals.

5   MR. KELLY: Of course they are.

6   MR. EARLE: So I will object on

7   that basis as well.

8   MR. POLAND: Object to the form.

9 A I would say it depends. I think knowing what I

10 know about redistricting I would be able to

11 distinguish the two. I would be able to

12 distinguish between a decision that I simply would

13 have made differently and one that just doesn't

14 look justifiable at all.

15 Q Let's go with the community of interest versus

16 delayed voting tension. At what point would you

17 be able to say it is wrong to reunify that

18 community of interest because there are too many

19 people who are going to have a delayed vote?

20   MR. POLAND: Object to the form.

21   MR. EARLE: Same.

22 A I don't know that I could identify a particular

23 threshold, but it would depend on the nature of

24 the community of interest. It would depend on the

25 nature of the historic connection. It would

1 depend on the number of people that were

2 disenfranchised. There may not be a huge

3 difference between 4,000 and 4,300, but there

4 would be a significant difference between 4,000

5 and 70,000.

6 Q You have mentioned contiguity a few times. Is

7 that an issue in Act 43 or Act 44 to your

8 knowledge?

9 A Not that I'm aware of. I know that there are

10 places in the map where, particularly in the area

11 around Madison, where the town of Madison and the

12 village of Shorewood have islands that are well

13 within the city of Madison. As far as I'm aware,

14 that fits within the legal exceptions to the

15 contiguity requirement.

16 Q Let's talk about core retention a little bit. Is

17 there any constitutional provision that requires a

18 legislature to consider core retention as it draws

19 a new district map?

20 A You know, this would be easier if I had a copy of

21 the constitution in front of me that I could refer

22 to.

23 Q To your knowledge.

24 A I can picture the section in my head.

25   MR. EARLE: Are you asking to be

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1 Q Were you able to find any constitutional provision

2 that requires that?

3 A Not in the text of the constitution, but it's

4 still, as far as the juris prudence that I'm

5 familiar with goes, it's one of the traditional

6 redistricting principles.

7 Q It's not something we specifically find in the

8 constitution. Is it something we specifically

9 find in any statutes?

10 A Not that I'm aware of. Again, I believe it's one

11 of the traditional principles that courts have

12 articulated as important to the representation

13 process.

14 Q Do you know if any of the courts that have

15 considered this issue have set a threshold that

16 required core retention percentage?

17 A Not that I'm aware of.

18 Q We have also talked about respecting municipal

19 boundaries as one of the redistricting principles

20 traditionally; is that right?

21 A Yes. That actually is -- in addition to being a

22 traditional principle, that is also in the

23 constitution.

24 Q What does the constitution say about that?

25 A Let me make sure. I believe this is the

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1   able to refresh your recollection?

2   THE WITNESS: If I may.

3   MR. EARLE: We have a request that

4   he be able to.

5   MR. KELLY: Do you have a copy of

6   the constitution?

7   MR. EARLE: I don't. It was your

8   question, so I was wondering if you have a

9   copy.

10 Q I just wanted to know the state of your knowledge

11 at the moment. I don't mind if you want to take a

12 look, but that's not necessary.

13   MR. EARLE: Why don't we go off the

14   record.

15   (Recess)

16 Q Professor Mayer, you have in front of you a volume

17 of laws that includes among other things the

18 Wisconsin Constitution and the United States

19 Constitution. Before we went on the break I had

20 asked you if you knew if there is a constitutional

21 requirement either in the Wisconsin or federal

22 constitution for a legislature to account for core

23 retention as it builds a new legislative district

24 map. Do you recall that?

25 A Yes.

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1 constitution, Article IV. I believe it says

2 that -- it requires an effort to apportion the

3 legislature.

4   THE WITNESS: I just want to make

5   sure that this is not a statute. This is the

6   constitution?

7   MR. POLAND: That's the statute.

8   The constitution is at the beginning of the

9   volume.

10   THE WITNESS: The federal

11   constitution?

12   MR. POLAND: And then it go into

13   the state constitution.

14 A Okay. I wound up in the statutes. All right. So

15 the constitution does not make any reference to

16 respecting political subdivisions. It refers only

17 to equal population, compactness and contiguity.

18 Q But you were referring to a statute that had

19 something to say about respecting municipal

20 boundaries?

21 A Yes. It was a section dealing with the 1983 court

22 decision that established legislative boundaries.

23 Q Do you know if that prohibits splitting

24 municipalities in drawing a legislative district

25 map?

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1 A It does not prohibit it.

2 Q What does it say about it?

3   MR. EARLE: I'm going to object.

4   This quiz about his view of the law with a

5   law book in front of him is kind of like

6   you're asking him for legal interpretation.

7   MR. KELLY: That's fair. I don't

8   intend to follow this very far.

9 A You want me to look?

10 Q I'm really more interested in knowing how you

11   account for this as you come up with your opinions

12   on what's a good map versus not a good map. When

13   you come up with those opinions if you refer to

14   the statutes then sure we can go and look at the

15   statutes.

16 A No. I was referring to --

17   MR. POLAND: Before you answer I

18   just want to object to the form of the

19   question.

20 A I'm sorry. Can you ask the question again?

21 Q I sure can. If in coming up with your opinion

22   about whether a map splits too many

23   municipalities -- if you have recourse to statutes

24   in doing that, then let's take a look at the

25   statute. If that's not necessary for you to come

                        125

1   up with your conclusion, then I just want to hear

2   from you what you consider to be the standard for

3   what constitutes splitting too many

4   municipalities.

5   MR. POLAND: Object to the form of

6   the question and I think it misstates his

7   opinions.

8 A I did not make a claim that Act 43 split too many.

9   I made a specific claim that it unnecessarily

10   split municipal subdivisions and gave the examples

11   of the city of Beloit and the city of Marshfield.

12   And that was not in reference to a particular

13   statutory citation but one of the traditional

14   redistricting principles.

15 Q So your opinion on that was simply that it just

16   wasn't necessary?

17 A That's correct.

18 Q The map could have been drawn in another way that

19   wouldn't have split those municipalities?

20 A That's correct.

21 Q Did you draw a map that would have avoided

22   splitting those municipalities and then observe

23   what affect that might have had on municipal

24   splits in other districts surrounding that or any

25   of the other traditional redistricting principles?

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1 A I did not.

2   MR. EARLE: Form.

3 Q Well, finally, we get to look at your report.

4   MR. EARLE: Now he's going to start

5   the deposition.

6   MR. KELLY: Yes. We begin now.

7   (Exhibit Nos. 1016 and 1017 marked for

8   identification)

9 Q Professor Mayer, you have been handed what's been

10   marked 1017. Can you take a look at that and tell

11   me what it is.

12 A It is my December 14, 2011 expert report.

13   MS. LAZAR: For the record I'll

14   note that when you have tabbed spaces there's

15   handwriting in between on single spaces.

16   That was not in your report. I wrote those

17   tabs one through I think it's eight. So if

18   you note those, those are my handwriting.

19   THE WITNESS: Okay.

20   MS. LAZAR: Actually, one through

21   nine.

22   THE WITNESS: Okay.

23 Q Would you turn with me to Page 6 of your report.

24   I see that there are three bulleted points under

25   Section III A. Do you see that?

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1 A Yes.

2 Q The third of that says, "It appears that the

3   congressional redistricting plan has the same

4   flaws as the legislative plan," and it goes on

5   from there. Do you see that?

6 A Uh-huh.

7 Q Does this report, Exhibit 1017, contain an

8   analysis of Act 44?

9 A In the rest of the text?

10 Q Correct.

11 A I don't believe so. Let me just double-check.

12   No.

13 Q Has anyone retained you to provide an opinion on

14   Act 44 in this case?

15 A I would have to go back and look at my original

16   retainer letter, but I focused the bulk of my

17   attention on Act 43.

18 Q Do you intend to provide any opinion on Act 44 at

19   the trial of this matter?

20 A It depends on what issues come up and what I'm

21   asked about, but I suspect not.

22   (Exhibit No. 1018 marked for

23   identification)

24 Q Professor Mayer, you have been handed what's been

25   marked as 1018. Will you take a look at that,

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1   please, and tell me what it is.

2 A This is my January 13th rebuttal report.

3 Q Does your rebuttal report address Act 44 at all?

4 A No.

5 Q To the best of your knowledge have you submitted

6   any report in this action that addresses Act 44?

7 A Other than what was in my original report. These

8   are the only things that I've formally submitted.

9 Q So when you're referring to your original report,

10   that would be Exhibit 1017?

11 A Yes.

12 Q And the extent to which 1017 analyzes Act 44 is

13   that third bullet point on Page 6; is that

14   correct?

15 A That's correct.

16 Q Let's look at the bottom of Page 6 of Exhibit

17   1017. The last sentence says, "In addition to the

18   statutory and constitutional requirements, states

19   are bound to comply with traditional redistricting

20   principles." Then it continues on the next page

21   to list some of those principles. What is it that

22   binds the states to complying with those

23   principles?

24 A The fact that a plan that is challenged in court

25   may in the sense of could possibly be overturned

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1   on the basis of violations of some of these

2   principles.

3 Q And I'm going to use Page 7 to take a step back,

4   actually, to finish up something that I missed.

5   On Page 7 your point number four for the

6   redistricting principles is disenfranchising as

7   few voters is required under the applicable

8   standards. Do you see that?

9 A Yes.

10 Q Is that a constitutional mandate?

11 A I don't believe so.

12 Q Is it found anywhere in the statutes to the best

13   of your knowledge?

14 A It may be.

15 Q But you don't know?

16 A I don't know. Can I add something to that?

17 Q Please.

18 A It was an important issue in the last round, the

19   2001-2002 round, the *Baumgart v. Wendelberger*.

20   That was one of the issues that I looked at.

21 Q The delayed voting?

22 A Yes.

23 Q That was an important factor in 2002?

24 A It was in the decision. It wasn't a major part of

25   my analysis, but it was something that the judges

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1   paid attention to.

2 Q Would you turn with me to Page 11 of Exhibit 1017.

3   Look at the first full paragraph. This is the

4   section -- correct me if I'm wrong, but this is

5   the section that discusses how many people got

6   moved from one district to another; is that right?

7 A That's correct.

8 Q In the second sentence you say, "But to achieve

9   this," that is, population equality, "the enacted

10   plan shifted more than 3.5 million individuals

11   around from one district to in other -- in effect,

12   a small net population change was achieved by

13   moving a large fraction of the State's

14   population." Do you see that?

15 A Yes.

16 Q Where did that 3.5 million figure come from?

17 A That came from a report that I asked Joel Gratz to

18   generate which looked at the number of people that

19   were moved into or out of each district and I

20   simply summed those totals up and that's how I

21   arrived at that figure.

22 Q Doesn't that method result in double counting

23   movements? That is to say, you're counting them

24   once when they leave a district and then again

25   when they're entering the new district?

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1 A Let me check. I would have to look at my original

2   spreadsheet. It looks like for each district I

3   calculated the number of people who were moved in

4   and moved out and came up with a total population

5   shift for each district.

6 Q So when you are counting for -- let's just pick

7   two districts. We'll say they're next to each

8   other, district one and district two. You're

9   counting one set of people in district one who are

10   leaving that district, right?

11 A Uh-huh.

12 Q And they go somewhere, right? They don't just go

13   away. They go into another district. And in that

14   district they are counted as coming into a

15   district; is that right?

16 A I believe so, yes.

17 Q So what you would be doing, if we just had this

18   two exhibit example or two district example, you

19   would be counting those people twice, once as they

20   left the district and once as they entered the new

21   district.

22 A I'm just trying to mentally add up some of these

23   numbers.

24 Q If it would be more helpful, is that one of the

25   tables that would be on the CD that you produced

1 today?

2 A I believe so. It was one of the files that I

3 produced as part of the expert report. The only

4 reason I'm hesitating is that is something that I

5 thought of when I originally did this, and I

6 believe I corrected for that by making an attempt

7 to not double count to correct for this problem.

8 I would have to look at which column I added to

9 see -- it's possible that I added up the totals in

10 Column Six and divided it by two.

11   MR. EARLE: Should we go off the

12   record and take a look at that?

13   MR. KELLY: If it's on the DVD,

14   perhaps that would be the best way to do

15   that.

16   We can go off the record.

17   (Recess)

18 Q All right. Before we took the break, Professor

19 Mayer, you were taking a look at Page 11 of

20 Exhibit 1017, your report in this case, and in

21 particular the figure of 3.5 million individuals

22 shifted from one district to another. You were

23 taking a look at -- we took the break so you could

24 take a look at some of the material that you

25 referenced in creating this report. Would you

133

1 calculated as the average for each district and

2 for each district the people who were moved was

3 compared to the population change that was

4 required to achieve or to get sufficiently close

5 to population equality. So while I agree that the

6 overall number would need to be changed, I would

7 suggest that those ratios are more defensible

8 because they apply to each particular district in

9 which people are not double counted.

10 Q Let's do this and then we will go off the record

11 so we can switch the DVD.

12   (Exhibit No. 1019 marked for

13   identification)

14 Q Professor Mayer, you have been handed what's been

15 marked Exhibit 1019. Would you please take a look

16 at that and tell me what it is.

17 A This constitutes some corrections I made to my

18 original report when upon further investigation I

19 discovered some errors in some of the original

20 calculations and in the graph of Latino versus

21 non-Latino voter registration in Milwaukee in the

22 city of Milwaukee.

23 Q Just so you know, the Exhibit 1017 does not have

24 the corrected pages so I've got the original pages

25 in there. The corrected pages are now before you

135

1 mind telling me what you found.

2 A I took a look at the spreadsheet that I used to

3 calculate this number, and, although my

4 recollection was that I had corrected for that

5 possibility, it appears that I did not.

6 Q So do we know what the actual number should be?

7 A Well, there are different ways to interpret it.

8 If you count, as you put it, double counting, that

9 number would be divided by two.

10 Q So say approximately 1.75 million?

11 A Roughly.

12 Q Okay.

13 A Again, the overall number is different from the

14 numbers that pertain to each district. But the

15 overall number, yes.

16 Q In going down to the next paragraph on that page,

17 the second sentence, "These shifts were

18 unnecessary to achieve population equality, since

19 equality could, by definition, have been achieved

20 by a general shift/change ratio much closer to 1

21 than the overall average ratio of 53.5 for the

22 assembly or 55.0 for the senate." Accounting for

23 the change in the 3.5 million figure, how would

24 those ratios change? Do you know?

25 A I don't. It's difficult to say because those were

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1 as Exhibit 1019. All right. Can you tell me what

2 types of factors can affect core population

3 retention in drawing a new legislative map.

4 A Well, that question as phrased is difficult to

5 answer because there are myriad factors that can

6 affect core population retention. The calculation

7 of core population retention is a relatively,

8 well, relatively simple probably overstates it,

9 but is a matter of determining what parts of the

10 old district or the greatest part of an old

11 district that might have had a different number is

12 retained in the newly drawn district.

13 Q I might have misunderstood this part of your

14 report. Was this part of your report, looking at

15 core retention, done to suggest that there may

16 have been a partisan motivation for how core

17 retention played out in republican versus

18 democratic seats?

19 A That was not the intent of doing it, but I did

20 notice a pattern when I compared the core

21 population retention in districts that were

22 represented by democrats versus republicans who

23 were elected in 2012. And I note that this --

24 well, there were no members of the assembly who

25 were recalled. But I did not take into account

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1   the results of the senate recalls in making any of
2   these calculations.
3 Q You mentioned that there are myriad factors that
4   can affect core population. Partisan motivation
5   would just be one; is that right?
6 A That's correct.
7 Q Did you attempt to control for all of those other
8   factors that can affect core population in coming
9   to a conclusion about whether there was any
10 partisan motivation in how the core retention
11 played out in republican versus democratic
12 districts?
13 A I did not. But my assumption in doing the
14 analysis is that over the full range of districts
15 that those affects would absent the partisan
16 motivation average out because they can be
17 affected by areas of population growth, areas of
18 population decline and so forth. But my
19 assumption was that there wouldn't be a partisan
20 pattern in those factors.
21 Q Let's take a look at those assumptions. You
22 mentioned one of them, population growth or at
23 least population change. Do all parts of the
24 state affect population change to the same extent?
25 A No.

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1 Q Let's take for the sake of discussion southeast
2   Wisconsin and in particular Milwaukee County and
3   some of the surrounding counties. Have all of
4   those counties in southeast Wisconsin experienced
5   population change in the same way?
6 A No.
7 Q What's been the difference?
8 A The city of Milwaukee has I believe lost
9   population either in the absolute or relative to
10 other areas. The suburban areas either on the
11 outskirts of Milwaukee County or the surrounding
12 areas along with Dane County have tended to grow
13 in population.
14 Q What do you know about the partisan affiliation of
15 the population say in Milwaukee County as opposed
16 to the contrast with the collared counties?
17 A Well, Milwaukee County is significantly more
18 democratic, and the surrounding counties,
19 Waukesha, Ozaukee, et cetera, are republican
20 strongholds.
21 Q And you consider that would be a significant
22 differential between those?
23 A Yes. But it's not clear that population growth
24 can be expected to affect core district retention
25 in the manner that's similar to places that lose

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1   population because if an area of the state has
2   sufficient population loss that it loses a
3   district, you have to reconfigure all of the
4   districts in that area which will have an impact
5   on core population retention in that area.
6   Similarly, if an area has grown to the point where
7   it requires you to draw up a new legislative
8   district, then drawing that new district will have
9   an impact on the other districts in that area. So
10 it's not necessarily the case that areas of
11 growth, republican areas, can be expected to have
12 lower core retention than democratic areas that
13 have lost population.
14 Q What happens if there is a -- let's say Milwaukee,
15 the southeast Wisconsin area. There's an area of
16 population decline so the districts have to grow
17 but they're able to expand out far enough to
18 capture the population they need without going too
19 far into strongly republican territories. What
20 affect would that have on the partisan comparison
21 of core retention?
22 A If I understand your question that if you had an
23 area of the state like Milwaukee that lost
24 population and consequently needed to reconfigure
25 the districts around that area so that they were

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1   as they may once have been entirely contained
2   within Milwaukee County but now had to reach out
3   as a number of them do, that they begin either in
4   the city of Milwaukee or in the county of
5   Milwaukee and extend across the county line into
6   Waukesha County, I would expect that the affect on
7   core population retention would be roughly similar
8   in both areas because in one case you are changing
9   the configuration of districts in a democratic
10 area and in the other case you're reaching into a
11 republican area and adding. So the core
12 population would, not completely, but I would
13 expect that the overall affect would be similar in
14 the sense of you wouldn't see 80 percent in one
15 instance and 20 percent in another.
16 Q What if the way that the population equalization
17 process worked out was to simply eliminate a seat
18 in the Milwaukee area and recreate it somewhere
19 out in the Dane County area? Would that have an
20 affect on the partisan analysis of core retention?
21 A That would have an affect of reducing -- my
22 expectation is that would have the affect of
23 reducing the core population retention in both
24 areas. But, again, a change of one or two
25 districts is not sufficient to cause an overall

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1   difference when you're talking about 99 districts.
2   Even 100 percent change if you averaged across all
3   democratic or all republican districts would be
4   less than a 3 percent change in the overall
5   democratic average and less than that in the case
6   of republicans since they hold more seats.
7 Q If we refer to Exhibit 1019, you note on Page 12
8   an approximate nine percentage point difference
9   between core retention figures for republicans as
10   opposed to democrats.
11 A That's correct.
12 Q All right.
13 A This is after the corrections I made.
14 Q Correct. So now if we were to account for that
15   lost seat in southeast Wisconsin and being
16   recreated elsewhere, how would that affect those
17   numbers?
18 A Not by much. I would expect that you would see a
19   core population retention drop by 10 or
20   15 percentage points in both areas. Again,
21   without looking at the corrected data file I'm not
22   precisely sure what they would be, but that's not
23   the major cause of this disparity. That's a
24   factor in it, but a change like that of dropping a
25   district here and adding a district in that area

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1   would be insufficient to cause this kind of change
2   because you also saw growth in republican areas
3   which would tend to drive down the core retention
4   in areas of growth.
5   MR. KELLY: I think we probably
6   need to change the DVD.
7   (Recess)
8 Q If a seat disappears and gets recreated in another
9   place, that would be 100 percent new population
10   for that recreated seat. Would that be correct?
11 A No. That would be incorrect.
12 Q Why is that?
13 A Because there would still be portions of that
14   newly created district that existed in the
15   previous districting plan. The core district
16   retention wouldn't be zero, but it would be --
17   depending on how the district was configured, it
18   would be a number. I can't say without knowing
19   which district we're speaking of because I did
20   prepare or have a spreadsheet prepared that listed
21   the core district retention. In fact, this is the
22   sheet where I identified the ones that I had to
23   correct.
24 Q Let's go ahead and mark that as an exhibit then.
25 A I don't know that this has the corrections on it.

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1   Let me just look at this for a moment.
2 Q Sure.
3 A I would have to look at the corrected spreadsheet
4   that I did because this was how I identified the
5   places that I needed to recalculate.
6 Q Let's go ahead and mark that as an exhibit.
7   (Exhibit No. 1020 marked for
8   identification)
9 Q Can you just tell me what Exhibit 1020 is as it is
10   before you.
11 A Well, when I compared my core district retention
12   numbers to the numbers that Professor Gaddie had
13   created, I noticed a large number of discrepancies
14   where his numbers were different than mine. I
15   prepared a spreadsheet that listed what I had and
16   what he had, and, when the numbers did not match,
17   I investigated to see what the cause was and
18   whether my numbers were correct or whether his
19   calculations were correct. So the delta, which is
20   the rightmost column, is 0 for all of the
21   districts in which the core population retention
22   was the same. And in every case where it was
23   above 0 I investigated by looking to see whether I
24   needed to recalculate those numbers. Basically
25   the numbers that under the column listed as Gaddie

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1   -- if I concluded that his numbers were the
2   correct ones, I drew a line under them and then
3   usually wrote a C next to it to designate correct.
4   In those cases where I concluded that my numbers
5   were more accurate, which is under Core Population
6   Retention, I underlined that number and wrote a C
7   next to it.
8   So one of the things that we can infer from
9   this table is that the assembly districts in the
10   Dane County area, I don't know exactly what the
11   numbers are, they tended to be the democratic
12   districts between the 72nd and 81st district. In
13   the three cases that I corrected them, which is in
14   the 76th, the 80th, and the 81st, my corrected
15   numbers actually increased the core population
16   retention and in one case significantly. My
17   original calculation was 6 percent, and I
18   concluded that was incorrect and substituted
19   Professor Gaddie's number of 57.6 percent. I
20   don't think that you can make a general statement
21   that the fact that -- one of the reasons why these
22   numbers differ is that initially Professor Gaddie
23   and I used different rules. For the most part he
24   calculated -- he used a different process for
25   calculating incumbency, areas where there was

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1   still an incumbent, and areas where there were new

2   districts where I tried to apply a consistent rule

3   whether or not it was an open seat or a paired

4   seat or a newly created seat. That actually

5   occurred in a number of areas in Dane County

6   because there was an additional seat created. So

7   that was the source of, one source, of the errors.

8   But you see in the 76th my original calculation

9   went from 12 to 68, went from 6 to 57. It raised

10   those numbers which is why the differential

11   decreased from 13 percent to 9 percent. So it's

12   not the case that that division of losing seats in

13   Milwaukee and gaining seats in Dane County drove

14   down the numbers. Actually, when they were

15   corrected, it drove the numbers up --

16 Q All right.

17 A -- for democrats.

18 Q So the work that's reflected on Exhibit 1020 went

19   into the corrections that you supplied in

20   Exhibit 1019?

21 A That's correct.

22 Q Does your analysis of core population retention

23   with respect to republicans versus democrats

24   control for complying with the Voting Rights Act?

25 A No.

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1 Q Could compliance with the Voting Rights Act have

2   an affect on core retention?

3 A That's actually unlikely because compliance with

4   the Voting Rights Act would tend to give the map

5   drawers an incentive to keep the old districts,

6   much of the old district cores intact, because

7   dramatic changes in the district composition

8   absent significant population or dramatic

9   population growth could conceivably become part of

10   a voting rights claim if the core district

11   retention was dramatically lower. If you look at

12   the Milwaukee districts, which are basically 7

13   through 13, those numbers tended to be not

14   dramatically below the average of 53 percent.

15   Some of them are a little bit higher. Some of

16   them are a little bit lower. The one that's the

17   lowest, 31 percent, 30.9 percent, is the 7th

18   district. So I don't think that that in itself

19   accounts for a major part of the disparity.

20 Q Is it possible if the map drawer privileged

21   reuniting communities of interest over core

22   retention could that adversely affect core

23   retention numbers?

24 A It could have a marginal affect, but, again, given

25   the number of areas where that was likely an issue

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1   I suspect that it would not have a significant

2   affect.

3 Q So in your view what is the major driving

4   causative affect of a low core retention?

5 A Well, again, not knowing the motivations of the

6   map drawers -- I've read the depositions. I've

7   read the hearings. It's not clear what their

8   motivations were beyond what they testified which

9   was basically equal population and concern for

10   minority communities. It does certainly provide a

11   reason to suspect that there was some other factor

12   that was behind the empirical fact that democratic

13   districts appear to have been reconfigured

14   differently than republican districts. But,

15   again, I'm inferring from the data at hand absent

16   a clear picture of what the people who say they

17   drew the map did or what they said they did.

18 Q Is a 59.1 percent core retention for an average

19   for democrats versus an average of 68.2 percent

20   core retention for republicans -- does that make

21   Act 43 an invalid map?

22 A No. Not by itself.

23 Q Is there to your knowledge any differential beyond

24   which it would necessarily mean that the map was

25   invalid?

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1   MR. POLAND: Object to the form of

2   the question.

3 A Based on my understanding of the juris prudence

4   which is based as an informed observer social

5   scientist and not as a legal scholar, I would say

6   extremely unlikely. It would have be an

7   extraordinary set of circumstances for that to be

8   viewed as constituting an invalid map.

9 Q Do you know what the term political gerrymandering

10   means?

11 A Yes, I do.

12 Q What does it mean?

13 A It means that a party in power uses its authority

14   to draw maps to provide for a political advantage

15   for members of that party by drawing districts in

16   a particular way, packing democrats, cracking

17   democrats, packing republicans, cracking

18   republicans and so forth.

19 Q Do you know if there is a standard either in the

20   constitution, statutes or case decisions that sets

21   forth a test so you can know whether a political

22   gerrymander had occurred?

23 A Under the U.S. Constitution the answer to that

24   question is no. There are two major supreme court

25   decisions, one from I believe it's the 1980s,

Davis v. Bandemer, and one from 2000, *Vieth v.*
Jubelirer. In effect the *Vieth*, if I'm
pronouncing that correctly, was a plurality
decision which established the principle that
political gerrymandering is a non-justiciable
issue.

Q What do you understand a non-justiciable issue to
be?

MR. POLAND: I'm going to object to
the extent that it calls for a legal
conclusion.

A My understanding is that it means that the courts
will decline to become involved in the issue and
will leave it up to the political branches to work
out.

Q Let's take a look at Page 14 of Exhibit 1017. I'm
looking at sub point three which is the
compactness analysis.

A That's Page 13.

Q Right. It carries over to 14; is that right?

A The bullet points do not. The last two paragraphs
of that section are on Page 14 in my copy.

Q Let me see. I think we have got the same thing.
That's fine. Let's start with Page 13. You
identified four compactness calculations there; is

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that correct?

A Yes. And it looks like I misidentified the Roeck
test which had nothing to do with circles but
instead looks at the area of the minimum convex
shape that can surround a district.

MR. POLAND: Just a point of
clarification. Are you asking him about the
corrected pages or the other pages?

MR. KELLY: That's right.

MS. LAZAR: There's only one thing
I think on that page.

MR. POLAND: I just want to make
sure that we're clear.

Q Why don't we look at the Page 13 on Exhibit 1019.

A The only thing that changed was the numbers in the
last sentence or, actually, the last number in
that paragraph which changed from 78.2 to 77.4.

Q So that's not affecting our discussion with
respect to compactness. Looking back on our
conversation this morning then, is there a better
name that we should assign to what we were
referring to as the Roeck test?

A I would prefer to use the terms that I had here.
I should have asked to look at this.

Q That's fine. If you wished after the deposition

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is over to change the reference on the
transcript -- I'm not going to hold that against
you if you want to do that. Otherwise we can just
agree that it should be referred to as which of
these?

A Which measure are we talking about?

Q Whatever we identified as the Roeck test.

A I had misidentified the convex hull or Roeck test
which I list as number three as the circumference
measure.

Q We talked about a variant of the perimeter test
being the Roeck test. What would be the better --

A The circumference measure which is number two.
The area of the circle with the same area as the
district divided by the perimeter of the district.

Q So you identified four equations and you said you
calculated the values for all four; is that right?

A That's correct.

Q Do the calculations for all four appear on a table
somewhere?

A Let me check. I don't believe they do. Although
I believe I provided the spreadsheet on which
those calculations were based, I did not make an
exhibit out of that.

Q And when you say you produced it, would that be in

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the material you produced today or that
accompanied your reports at the time?

A I believe it's what accompanied the report. Let
me just check. Yes. It would be the assembly
compactness report, the assembly 2011 compactness
report.

Q Where are you looking right now?

A On Page 4. It's about the eighth, ninth, tenth
and eleventh files.

Q Seven through eleven?

A I would say nine through eleven.

Q That has the scores for all four of those
calculations?

A I believe they do.

Q Let's talk a little bit about delayed voting. I
think as you made clear in your report because
Wisconsin has staggered four-year senate terms if
a person in one cycle is in an even numbered
district and gets moved to an odd numbered
district there would be a two-year delay in their
ability to vote for a senator.

A That's correct.

Q I may have asked this earlier. I apologize if I
did. Is the requirement to consider the affect of
redistricting on delayed voting -- is that a

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1 constitutional, statutory or common law issue?
2 A I'm afraid I can't answer that because I'm not
3 qualified to answer questions about common law.
4 Q That's fair. Have you seen that embodied in a
5 constitutional provision?
6 A I don't believe so. Not in the state of
7 Wisconsin.
8 Q Have you seen it embodied in a Wisconsin statute?
9 A I don't believe so, but I've seen it addressed in
10 a number of judicial decisions going all of the
11 way back to 1983.
12 Q So what we know is that this is something that
13 whoever is drawing a new legislative district map
14 should be considering?
15 A That's correct.
16 Q Do you know if there is an upper limit on people
17 who would have delayed votes beyond which would
18 invalidate a map?
19 A I'm not aware of any particular threshold. I know
20 that the traditional goal is to keep that number
21 as small as practicable or as small -- not as
22 small as possible but as small as it can be given
23 the other interests, other values and principles
24 in play.
25 Q I like the distinction you made. So there's a

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1 difference between as small as possible on the one
2 hand and on the other as small as practicable.
3 Would that be true?
4 A Yes.
5 Q And the difference is that small as is practicable
6 accounts for the fact that there are other
7 redistricting considerations that may affect the
8 number of people who have delayed voting?
9 A That's correct. But I also know that given any
10 particular map that there will invariably be
11 alternatives that disenfranchise fewer voters or
12 fewer population because it applies to population
13 and not just voters.
14 Q In those alternatives those alternatives might
15 adversely affect other traditional redistricting
16 principles.
17 A That's possible.
18 Q And it is acceptable that someone drawing a map
19 might put more weight on those other traditional
20 redistricting principles than they put on the
21 delayed voting affect?
22 A Well, I'm not sure I would agree with that for two
23 reasons. One is that the delayed voting -- in
24 thinking about the weight that I gave to these
25 different principles, I would actually rank that

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1 higher than say even something like compactness
2 because the disenfranchisement has a direct impact
3 on the ability to exercise a right guaranteed
4 under the Wisconsin constitution and that in my
5 view it will in general be the case that you
6 should be able to draw a different configuration,
7 different map configuration, that does not have a
8 materially harmful or does not materially affect
9 or diminish these other values, other principles,
10 while still attempting to minimize the number of
11 disenfranchised voters.
12 Q So for you personally you weigh the delayed voting
13 affects of a map more heavily than other
14 traditional redistricting principles?
15 A I don't think it's just a matter of me personally.
16 I think it's something that certainly judges pay a
17 good deal of attention to.
18 Q Is there a requirement to weigh delayed voting
19 affects more heavily than other traditional
20 redistricting principles?
21 A A requirement?
22 Q Uh-huh.
23 MR. POLAND: Object to the form of
24 the question.
25 A I'm not aware of one.

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1 Q So it could be legitimate for a map drawer to
2 weigh a different redistricting principle more
3 heavily than the delayed voting affects.
4 MR. POLAND: Object to the form of
5 the question.
6 A Well, again, it's contextual. That's a purely
7 hypothetical question that depending on the
8 principle that's at stake and the magnitude of the
9 change that would be required in order to reduce
10 the number of disenfranchised voters or
11 disenfranchised population -- I can envision
12 circumstances in which that could happen.
13 Q You mentioned that delayed voting affects a
14 specific right protected by the Wisconsin
15 constitution. What right is that?
16 A As I read it that it is the right to vote for a
17 state senator every four years.
18 Q Do you know, is that the section that sets a
19 senator's term at four years? Is that what you're
20 referring to?
21 A Yes.
22 Q Do you know if there was a provision of the
23 Wisconsin constitution that says a voter has a
24 right to vote every four years for a senator?
25 A I believe that's implied in setting the term of a

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1   senator at four years.

2 Q Why do you believe that's implied?

3 A Because we elect senators and if senators in one

4   district are elected every four years, the only

5   way that can happen is for people in that district

6   to vote every four years. I also believe that's

7   true because the judicial decisions that I'm

8   familiar with place significant weight on the

9   notion of disenfranchisement in which voters, when

10   they are shifted or when district -- I'll put it

11   as district lines are redrawn because voters are

12   not actually physically moved. When district

13   lines are redrawn and they wind up in an odd

14   numbered district and when they were previously in

15   an even numbered district and in the even number

16   district they voted in 2008 and would normally,

17   other things being equal, would be able to vote in

18   2012 when they are redistricted they do not have

19   an opportunity vote for senator until 2014.

20 Q Let's talk just for a moment about a voter who

21   does physically move. He moves from an even

22   numbered district to an odd numbered district and

23   so is unable to vote for senator again for an

24   extra two years. Has his constitutional right

25   been violated that you have identified?

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1   from even to odd senate districts because of

2   population shifts. So if the state supreme court

3   or federal courts held that it could never happen,

4   it would make the redistricting process -- it

5   would not be possible to meet the other criteria

6   of equalizing population.

7 Q Is it your opinion that having 299,000 or so

8   individuals who experience delayed voting is too

9   many?

10 A I believe the map could have and should have been

11   drawn so that fewer people were disenfranchised.

12   I base that not only on my opinion but in the

13   three-judge panel's decision which, again, I'm

14   probably going to get the procedure wrong, but

15   they denied the motion to dismiss.

16 Q Do you know why they denied the motion to dismiss?

17 A Without having it in front of me I don't know that

18   I could say with certainty.

19 Q Let's take a look at Exhibit 1018. Don't close up

20   your main report. Let's just put it aside for the

21   moment. If you would turn --

22 A I don't have it.

23   MR. POLAND: It's your letter

24   report.

25 A I see it here.

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1   MR. EARLE: You're asking for a

2   legal opinion.

3 A The comparison is inapposite because if I

4   voluntarily move, then I am -- just as if I make a

5   decision to move out of state I lose my right,

6   constitutional right, to vote in Wisconsin

7   elections. But there is no -- I don't believe

8   that there is a constitutional right implicated

9   because I've made a voluntary decision to move

10   whereas in redistricting it's not voluntary. The

11   decision is made for the voter.

12 Q In your opinion the constitution can be violated

13   however for a certain number of people.

14 A Well, again --

15   MR. POLAND: Object to the form of

16   the question.

17 A Again, I'm not an expert in constitutional law,

18   but my understanding is that almost every

19   constitutional provision can be breached or can be

20   conditioned on depending on whether the

21   governmental interest is sufficiently strong to

22   overweigh that. That applies to the 1st Amendment

23   to the 14th Amendment in the federal constitution.

24   So the need to redistrict and equalize population

25   will inevitably result in some people being moved

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1 Q If you could turn to Page 4. At the bottom of

2   what looks like -- it's actually the second

3   paragraph where you say -- do you see where you

4   say, "Yet he provides no justification for the

5   disenfranchisement of such an extraordinary number

6   of people"? Do you see that? I count the two

7   lines at the very top as being a paragraph.

8 A Okay. Yes. I see. It's the big paragraph. Yes.

9 Q Why do you say that that's an extraordinary

10   number?

11 A Because based on the decision of the 2002 court

12   and the 1992 court those numbers are larger than

13   they had been in each of the previous two

14   redistricting cycles.

15 Q What were the numbers in 1992?

16 A I believe the absolute number was about 177,000,

17   but I would have to look. Yes. The 2002

18   redistricting map was 177,000 and the 1992 was

19   257,000. That number is on the first full

20   paragraph on Page 5.

21 Q In terms of percentage of population how does that

22   differ?

23 A It's significantly larger than the 2002 round and

24   only marginally greater, one-one hundredths of a

25   percentage point, than the 1992 round.

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1 Q If the proportional number is only a fraction of a

2   percent greater than the 1992 number, would that

3   still be an extraordinary number?

4 A Based on the absolute number and based on my

5   belief that a map could have been drawn with the

6   smaller number of disenfranchised voters -- just

7   to give one example, the way in which the

8   southeast corner of the state was redistricted

9   between the 20th and 21st whereas up until 2011

10   most of Racine County and Racine constituted one

11   senate district and most of Kenosha County to the

12   south constituted a senate district and during

13   this round they were reconfigured so that Kenosha

14   and Racine were placed into a single senate

15   district and the remainder of those counties plus

16   some other areas were placed into a senate

17   district. By my calculation that single decision

18   alone disenfranchised I think I noted 72,000

19   people or close to 72,000 people.

20 Q Do you know why the senate districts were

21   reconfigured that way?

22 A I know what the claim was; that by linking Racine

23   and Kenosha that the senate districts reconnected

24   two cities that -- the claim was that that

25   constituted a community of interest.

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1 Q Does it?

2 A Based on the responses that I've heard from people

3   in Kenosha particularly, who are not have happy

4   about that reconnection, I'm not persuaded.

5 Q Did you talk to people in the rural parts of

6   Racine and Kenosha counties?

7 A No, I did not.

8 Q Is it possible that given that they're both rural

9   that they consider themselves to be a community of

10   interest?

11 A It's possible.

12 Q Is it possible that there's a legitimate

13   distinction in communities of interest between

14   urban and rural?

15 A It's possible.

16 Q I get the sense that you don't think so, though.

17 A Well, my conclusion is that I am unpersuaded that

18   that reconfiguration, given that it had been that

19   way for some time, was worth disenfranchising

20   72,000 people.

21 Q Is that a prudential decision or is this a matter

22   of right versus wrong?

23   MR. POLAND: Object to the form of

24   the question.

25 A I'm not sure I can give a definitive answer to

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1   that question. I would regard that as -- let me

2   be cautious here. I would regard that as an

3   indefensible decision not in the sense that

4   there's no possible justification for it but that

5   the justification offered is not sufficient to

6   warrant that particular decision.

7 Q Insufficient in whose eyes?

8 A Well, insufficient in my eyes as someone who knows

9   something about the redistricting process. I'm

10   not just making an uneducated guess here.

11 Q But it could be sufficient in someone else's eyes?

12 A That's possible.

13 Q But you can't point at that decision and say that

14   is a wrong decision and may not be made.

15   MR. EARLE: Object to the form of

16   the question and the emergent thespian nature

17   of it.

18   MR. KELLY: I didn't even touch the

19   table or the paper or anything.

20 A I'm sorry. I have forgotten the question.

21 Q We'll go back and let's do the question again.

22   (The following was read by the reporter:

23   Q "But you can't point at that decision and

24   say that is a wrong decision and may not be

25   made.")

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1   MR. POLAND: I will simply object

2   to the form.

3 A I will state that I disagree with the premise of

4   that question, but ultimately my answer would have

5   to be yes, that's correct.

6 Q Yes that's correct that you can't point to that

7   and say it's a wrong decision that may not be

8   made?

9 A Yes.

10   MR. POLAND: Let me object to the

11   form of the question.

12   THE WITNESS: I'm sorry.

13   MR. EARLE: Same objection.

14 Q Professor Mayer, you submitted an expert report in

15   the 2002 redistricting litigation in the state of

16   Wisconsin; is that right?

17 A That's correct.

18 Q Do you recall that your report was submitted in

19   support of I believe it was two different maps?

20 A I think that's correct. There were two democratic

21   alternatives and I think three republican

22   alternatives.

23 Q Do you recall if that report addressed delayed

24   voting affects of the maps that you were

25   supporting?

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1 A It did.

2 Q Do you remember the number of individuals who

3   would experience delayed voting in the two maps

4   that you supported in that litigation?

5 A I believe that both of those maps had the number

6   of disenfranchised voters roughly of 350,000.

7 Q That is higher than the number of individuals

8   experiencing delayed voting under Act 43.

9 A Yes. But what I did in that portion of my report

10   is compare the disenfranchisement in the democrat

11   alternatives to the disenfranchisement in the

12   republican alternatives and very clearly stated on

13   this point that the republican maps were superior.

14   So it wasn't as if I was saying that this is fine

15   and that this is better than the republicans'. I

16   very clearly stated that the lower

17   disenfranchisement numbers meant that on that

18   particular dimension that the republican maps were

19   superior.

20 Q Did you provide any input to those who drafted the

21   democratic alternative maps?

22 A I did not.

23 Q Do you believe that the democratic alternative

24   maps proposed in 2002 were invalid because of the

25   number of individuals who had experienced delayed

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1   voting?

2 A I was not asked to make that determination. I was

3   asked to compare the democratic maps and the

4   republican maps. That decision was beyond the

5   scope of what I was asked to do.

6 Q Do you think the number of individuals

7   experiencing delayed voting in the two maps that

8   you analyzed in 2002 for the democrats constituted

9   an extraordinary number of people?

10   MR. POLAND: I'm just going to

11   object to the form of the question and also

12   foundation.

13 A I honestly don't recall what I was thinking about

14   that at the time. It was a very small part of the

15   analysis. I focused most of my attention on other

16   issues.

17 Q Did you raise to the court the number of people

18   who had experienced delayed voting under the

19   democratic plans and pose to them that that would

20   be an extraordinary number?

21 A No. But I did say that the republican plans were

22   better on that score.

23 Q Did you suggest to the court that the democratic

24   plans would be indefensible because of the delayed

25   voting affect?

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1 A No. Because I wasn't asked that question.

2 Q The number of individuals who experienced delayed

3   voting in 1992 I think you said was something in

4   the neighborhood of 250,000?

5 A 257,000.

6 Q Is that an extraordinary number of people?

7 A The three-judge panel signed off on it. I'm

8   certainly not going to substitute my judgment

9   about the validity of a number for three federal

10   judges'.

11 Q As a percentage of population Act 43's delayed

12   voting affect is within a few -- it's within a

13   fraction of a percentage of what the three-judge

14   panel in 1992 did; is that right?

15   MR. POLAND: I'm going to object to

16   the form of the question.

17 A The percentage of population disenfranchised under

18   Act 43 is only slightly larger in percentage terms

19   than the percentage disenfranchised in 1992.

20 Q So you wouldn't second-guess that three-judge

21   panel in assessing the percentage of population

22   that experiencing a delayed voting affect and what

23   could constitute an effective map.

24   MR. POLAND: Object to the form of

25   the question.

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1   MR. KELLY: I don't like the

2   question at all. I'm just going to start

3   over.

4 Q Earlier you said that you wouldn't second-guess a

5   three-judge panel on what it considered to be an

6   acceptable amount of delayed voting affect, yes?

7 A Correct.

8 Q I'll just leave that. Let me go back to 1982. Do

9   you know if there was a legislative map or a

10   judge-made map in 1982?

11 A I believe in that case there was one of each.

12 Q Which one was enacted? Which one went into effect

13   first?

14 A I believe the judge-drawn map went into effect

15   first and then the legislature acted, but I could

16   be mistaken.

17 Q I think that's right. Do you know what the number

18   of individuals who would experience delayed voting

19   under the court-drawn map in 1982 was?

20 A I'm just looking to see whether I reference that

21   in my report. I don't know offhand what the

22   number or percentages were.

23 Q If I represented to you that the absolute number

24   of people who had experienced delayed voting under

25   the 1982 court-drawn plan was approximately

1   599,000 people, would you have any reason to
2   disagree with that?
3 A Well, not that I don't trust you, but I would
4   prefer to see the number.
5 Q I think that is a perfectly fair response. Assume
6   for the moment that that is the fact, that it was
7   approximately 599,000. Would you have any reason
8   for second-guessing the federal court in adopting
9   a plan that would have the affect of delaying
10   voting for 599,000 for two years?
11 A Well, my response would be that I would refer to
12   the 2002 case which disenfranchised essentially a
13   quarter of that as evidence that redistricting
14   technology, mapping software -- everything was
15   vastly different in 1983 than it is now, and that
16   may have been the best that could have been
17   accomplished given the state of technology. But I
18   think the evidence is clear now that it is
19   possible to draw a map with substantially smaller
20   populations of disenfranchised voters.
21 Q I take it you have not studied the 1982
22   court-drawn map?
23 A I have not.
24 Q Let's talk about the Latino districts for a little
25   bit. I'm sorry. I do need to back up. I don't

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1   want to pass over this. This one is interesting.
2   Professor Gaddie in his report noted that of the
3   areas that would experience delayed voting that
4   comprise the 299,000 or so that in some of those
5   districts there were recall elections for senators
6   just this past summer and he reduced the number of
7   individuals who would experience delayed voting by
8   the number of people who had an opportunity to
9   vote in a recall election over the summer. Your
10   rebuttal report takes exception to that.
11 A Yes, it does.
12 Q All right. Now, what I'm wondering is -- the big
13   question is why, but the more specific question is
14   if we are talking about a right to vote within a
15   certain period of time, didn't the people who had
16   an opportunity to vote in the recall elections --
17   weren't they given an opportunity to vote at least
18   once within four years for a senator?
19 A Well, I think you're comparing apples and oranges.
20 Q Tell me why.
21 A My reading of or my interpretation of the right to
22   vote every four years provides the right to vote
23   in fixed elections just as the fact that someone
24   who faces recall is reelected or replaced that the
25   result of that election does not delay the

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1   subsequent election by four years. It still takes
2   place as regularly scheduled in 2012. So I think
3   that it does not or ought not to be used as a
4   reason or justification or an explanation for why
5   it's okay to consider those voters or those people
6   who had an opportunity to vote to say that they
7   had an opportunity to vote in 2011 and their next
8   opportunity to vote is in 2014 and they only go
9   three years or three years and however many months
10   between elections. They still would have had the
11   right to vote in 2012 just like everybody who
12   remains in that district would have had. If you
13   were going to use that kind of accounting, you
14   would have to balance that by the fact that people
15   who either stayed in the original district or were
16   moved from an odd to an even numbered district get
17   an additional opportunity to vote because they
18   voted in 2008, 2011 or maybe even 2010 and they
19   still get an opportunity vote in 2012. I also
20   don't think that the fact that the exercise of one
21   right under the constitution provides a
22   justification for taking less seriously
23   disenfranchisement through redistricting.
24 Q So in your eyes, if I am understanding this
25   correctly, the right to vote for a senator is the

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1   right to vote every four years. No more. No
2   less.
3 A No. That's incorrect. Because some people get
4   the right to vote more either through a recall or
5   when they're redistricted and moved from odd to
6   even. So there are a variety of things in play.
7   The fact is that the people who are moved from an
8   even to an odd district -- they lose their right
9   to vote in 2012, and that is not sufficiently
10   counteracted by the fact that they got the right
11   to vote under the recall in 2011.
12 Q But I thought, and I'm sure you'll correct me
13   where I'm wrong -- I thought that the injury from
14   redistricting that causes delayed voting is that
15   you would go six years without an opportunity vote
16   for a senator.
17 A You would go six years without the opportunity to
18   elect a senator in a regularly scheduled fixed
19   election. You could easily -- in the new district
20   there could be a recall and you would get the
21   right to vote in 2012, 2013 through the recall.
22   But that doesn't in my view diminish the harm in
23   being denied your right to vote in the 2012
24   election which you lost through that move.
25 Q All right. So the injury is not that you go six

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1 years without an opportunity to vote for a

2 senator. The injury is that you go six years

3 without the right to vote for a senator in a

4 regularly scheduled quadrennial election?

5 A Yes. In my view a recall does not change the

6 nature of the right to vote in that regularly

7 scheduled election, and that is why in a senate

8 district -- say the numbers haven't changed. The

9 people who are in an even numbered senate district

10 or an odd numbered senate district who voted in --

11 I'm getting confused here. The people who got the

12 right to vote in a recall election in 2011 -- let

13 me make sure I'm talking about the right districts

14 here. All of the people who were elected in odd

15 numbered senate districts were elected in 2010,

16 November 2010. They took office I think in

17 December 2010 which means they cannot be recalled

18 until one year has passed since their taking

19 office. That means the only people who could be

20 recalled in 2011 were senators who were elected in

21 2008. The fact that they were -- I believe once

22 the final recall petitions -- it will be close to

23 every senator who was elected in 2008 may face a

24 recall. The fact that they had to run in a recall

25 and defend their seat has no bearing on whether an

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1 election for that seat will again be held in

2 November 2012. So it's not as if you run in a

3 recall and that begins a new senate term of four

4 years.

5 Q Right. That's certainly true. But you

6 acknowledge that the fact that there was a recall

7 gave the people in those recall districts the

8 opportunity to vote for a senator and not wait

9 more than three years and whatever months before

10 the next time they would be able to vote for a

11 senator.

12 A Well, I dispute the premise of that question

13 because yes they did get the right to vote for a

14 senator but in the way that recalls are conceived

15 that is not the same as having the right to vote

16 for senator at the end of the four-year term.

17 Q Why is that?

18 A Because they don't lose that right unless they are

19 redistricted.

20 Q But as far as what's occurring in a recall

21 election, you are voting for a senator, right?

22 There's someone that stands for one party and

23 someone stands for another party and you choose

24 between them just like in a regularly scheduled

25 election, yes?

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1 MR. EARLE: Object to the form of

2 that question.

3 A There are in fact substantial differences between

4 the two kinds of elections. As I pointed out in

5 my rebuttal report, turnout is substantially lower

6 in recall elections, even lower than the falloff

7 that occurs between a senate election that occurs

8 in 2008 during presidential election year and one

9 that occurs in 2010. If you think about the

10 context of the recall elections, most of them --

11 there were strategic decisions made about which

12 senators were going to be -- where those recall

13 efforts were focused. Most, not all of them, but

14 most of them were focused on races where the

15 democrats thought they had the best chance of

16 winning which meant that they were competitive,

17 enormous controversy over what was happening at

18 the state capitol, control of the state senate was

19 in play. These are things that should have or

20 would normally be expected to generate high levels

21 of engagement but still turnout was I think about

22 33, 34 percent lower than it was in 2008.

23 Q That doesn't have any affect, though, on their

24 ability to vote if they wanted to, correct?

25 MR. POLAND: Object to the form of

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1 the question.

2 A It doesn't impose any impediments to their voting,

3 but the fact that it was a recall -- recalls are

4 not directly analogous to the regular elections

5 that occur during the campaign season and when

6 people are otherwise engaged because there's

7 either a presidential election or a congressional

8 election or certainly maybe a senate election in

9 two out of three cycles.

10 THE WITNESS: Can we take a short

11 break?

12 MR. KELLY: We may.

13 (Recess)

14 Q Professor Mayer, let's look at your rebuttal

15 report, Exhibit 1018, on Page 9.

16 MR. POLAND: Is that Page 9?

17 MR. KELLY: Yes.

18 Q Do you see in the first full paragraph on Page 9

19 that you refer to a 1983 process and decision by

20 this court?

21 A Yes.

22 Q What decision is that?

23 A I believe that's the original redistricting

24 decision, but I have to say I'm not 100 percent

25 sure.

1 Q What significance does that decision hold for you?	1 my judgment that the opportunity to elect is
2 A Well, based on what I've written here that it said	2 conditioned strongly on the ability to vote and
3 that disenfranchisement of approximately 174,000	3 given that a significant percentage of voting age
4 voters through renumbering of senate districts	4 Latinos in the city of Milwaukee and in that area
5 constitutes a constitutional violation.	5 are not citizens, they do not have the opportunity
6 Q What do you conclude from that?	6 to vote and so the calculation of the voting
7 A Well, again, there's a certain contextual question	7 eligible population is necessary in order to
8 about what other issues are in play, but I take	8 establish that there is an effective voting
9 that as the number of disenfranchised individuals.	9 majority in those districts or in District 8.
10 It's possible to construct the map, and, again,	10 Q So for you it's important to calculate the
11 from the specific text it's not clear whether	11 percentage of citizen voting age population in the
12 that's voters or entire population. But that the	12 Latino community as opposed to simply the Latino
13 disenfranchisement ought to be and can be small.	13 voting age population.
14 Q That number in the 1983 decision, was that	14 A That's correct.
15 significant to you?	15 Q Do you know what the citizen voting age population
16 A In terms of establishing the notion that the	16 percentage in the Latino community was in 1998 in
17 number of disenfranchised voters should be small	17 District 8?
18 and giving not necessarily a goal but a	18 A I do not.
19 possibility. That's how I read it.	19 Q Do you know what it was in 2000?
20 Q So correct me if I'm wrong. You read that	20 A I have not done the calculations back that far.
21 decision and the 173,000 voter number to simply	21 Q Do you know what it was in 2002?
22 indicate that the number ought to be small but you	22 A I do not.
23 didn't attach any specific importance to the	23 Q Would it be reasonable to conclude that the
24 173,000 number?	24 citizen voting age population in Assembly
25 MR. POLAND: Object to the form of	25 District 8 increased between 2000 and 2010?
177	179
1 the question.	1 A That's a reasonable hypothesis, yes.
2 A I would have to say that I'm not sure that I	2 Q And also it would be reasonable to conclude that
3 actually read the full 1983 decision. I think the	3 the Latino voting age population increased in
4 number was pulled from it. I would have to say	4 Assembly District 8 between 2000 and 2010?
5 that I can't speak to the broader significance of	5 A We know that as a fact because you can compare the
6 that or the specific context in which that	6 Latino voting age population in District 8 in 2002
7 decision was reached.	7 as the result of redistricting based on the 2000
8 Q The number reached or addressed in the 1983	8 census numbers and compare that to both the 2010
9 decision, does that suggest to you an upper	9 population in the old districts and the 2011
10 threshold of delayed voters that would invalidate	10 population in the Act 43 districts.
11 a map?	11 Q So we know for a fact that the Latino voting age
12 A Not necessarily.	12 population in Assembly District 8 increased
13 Q Let's talk a little bit about Assembly Districts 8	13 between 2000 and 2010 and we can postulate that
14 and 9. Generally speaking my understanding is	14 the citizen voting age population in the Latino
15 that you conclude that Assembly District 8 does	15 community also increased between 2000 and 2010; is
16 not provide the Latino community a realistic	16 that right?
17 opportunity to elect a candidate of their choice;	17 A That's correct.
18 is that correct?	18 Q Is there any way of determining whether the
19 A I'm not sure if I would use the term realistic.	19 citizen, not the absolute numbers, but whether the
20 Q What term would you use?	20 citizen voting age population in the Latino
21 A I would say equal opportunity as other voters to	21 community in Assembly District 8 was greater or
22 elect a candidate of choice.	22 lesser than the citizen voting age population in
23 Q Why do you say that?	23 the Latino community under the Act 43 Assembly
24 A Well, that conclusion is based on an analysis of	24 District 8?
25 the eligible voting population among Latinos and	25 MR. EARLE: Can you read that
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1   question back to me.
2   (Question read)
3 Q I left out a year. Let's try that one again.
4   It's how late it is in the day. Let's try that
5   again. Is there any way of determining whether
6   the citizen voting age population in the Latino
7   community in 2000 in Assembly District 8 was
8   greater or lesser than the citizen voting age
9   population in the Latino community in current
10   Assembly District 8 under 43 in 2010?
11 A In theory you could because the census -- in the
12   enumeration the last time they asked a citizenship
13   question was on the long form, so you could come
14   up with a figure for 2000 combining the responses
15   for ethnicity and citizenship. For 2010 the
16   census no longer asked that question. There is no
17   longer a long form, so you would have to look at
18   what's called the American Community Survey which
19   was a -- the ACS encompasses a wide range of
20   things that are done in between censuses or censi.
21   But in particular there was a citizenship
22   component that was added in my understanding
23   specifically to obtain estimates of what the
24   citizen voting age population in various
25   communities would be in 2000 in preparation for

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1   the next round of redistricting. So the data
2   exists in order to make that determination.
3 Q But you have not done that determination?
4 A I have not.
5 Q But we can hypothesis or postulate that the Latino
6   citizen voting age population in Assembly
7   District 8 in 2000 was lower than it is today?
8   MR. POLAND: Object to the form of
9   the question.
10 A It's possible. There are a number of variables
11   that we wouldn't know. I wouldn't be able to say
12   by how much because there was substantial inflow
13   of Latinos between 2000 and 2010. So I think it's
14   reasonable to suggest that the citizen voting age
15   population, Latino citizen voting age population,
16   had grown, but by how much I can't say.
17 Q Are you familiar with a gentleman by the name of
18   Pedro Colón?
19 A Yes.
20 Q How are you familiar with him?
21 A He was a member of the state legislature, the
22   assembly and the senate, for a number of years,
23   and now I believe he's a Milwaukee circuit court
24   judge.
25 Q When he was in the assembly, do you know what

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1   assembly district he represented?
2 A I believe it was District 8.
3 Q Do you know when he was first elected?
4 A I'm not sure. I know he was in office in 2002,
5   but I don't know whether he was elected earlier
6   than that.
7 Q If I told you he was elected in 1998, would you
8   have any reason to disagree with that? I'm not
9   asking you to accept me as authority for the
10   source.
11 A I could check that easily enough by looking at the
12   Blue Book.
13 Q Yes. Let's assume that he was elected in 1998.
14   Would it be fair to say that Pedro Colón was the
15   candidate of choice of the Latino community in
16   Assembly District 8?
17 A That's most likely a true statement.
18 Q Would it be true in 2000 when he was reelected?
19 A I suppose, yes.
20 Q And in 2002 when he was reelected again?
21 A Yes.
22 Q And 2004?
23 A Presumably.
24 Q And 2006?
25 A I'm trying to remember when he was elected to the

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1   senate. Yes. He was a long-time representative
2   of that area.
3 Q Do you know when Mr. Colón went to the senate who
4   represented Assembly District 8 after him?
5 A I would have to check. I know JoCasta Zamarripa
6   was elected in 2010. I don't know who was elected
7   in 2008.
8   MR. EARLE: Are you saying he was
9   elected to the senate?
10   MR. KELLY: Actually, I'm going
11   to -- I think we need to -- I'm not sure.
12   I'm not exactly sure when --
13   MR. EARLE: I would represent to
14   you that he was never elected to the senate.
15   MR. KELLY: Thank you.
16 Q After for whatever reason he had --
17 A I'm getting confused with all of these years.
18 Q That's fine. For whatever reason he had for
19   leaving the assembly, do you know who the
20   representative was after he left?
21 A I would have to check a Blue Book to be sure.
22 Q But you know at some point JoCasta Zamarripa was
23   elected for Assembly District 8?
24 A That's correct.
25 Q Would it be fair to conclude that Ms. Zamarripa is

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1   the Latino community's candidate of choice in
2   Assembly District 8?
3 A Yes. But I also know that by 2010 the Latino
4   population had grown to the point where it was a
5   very high percentage of the voting age population
6   and may well have been the majority of the citizen
7   voting age population of Latinos in District 8.
8 Q Do you know if there was anyone but a Latino who
9   represented Assembly District 8 since 1998?
10 A I don't. But I know that on the common council,
11   the aldermanic districts, 8 and 12, which are
12   comprised most of that area, have with a couple of
13   interruptions are now and have for a while been
14   represented by white males.
15 Q Tell me again what the standard is we're looking
16   at here, an equal opportunity to elect a candidate
17   of choice?
18 A That's correct.
19 Q And our project right now is to determine whether
20   Assembly District 8 presents the Latino community
21   with an equal opportunity to elect a candidate of
22   their choice as configured today, right?
23 A That's correct.
24   MR. POLAND: Object to the form of
25   the question.

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1   MR. EARLE: I'm going to join.
2 Q If the citizen voting age population of the Latino
3   community in Assembly District 8 as created by
4   Act 43 is higher than the citizen voting age
5   population in the Latino community in Assembly
6   District 8 in 2000, wouldn't given the fact that
7   the Latino community has been able to elect a
8   candidate of choice over the past 12 years and
9   more suggest that under Act 43 Assembly District 8
10   they would have an equal opportunity to elect a
11   candidate of their choice still?
12 A Actually --
13   MR. EARLE: I'm going to object to
14   the form of the question.
15 Q It was long, but let's go with it.
16 A I would say not necessarily.
17 Q Why not?
18 A Because under Act 43 I recall doing some
19   calculations that show that the voting age
20   population and citizen voting age population
21   actually dropped a little bit between what
22   Assembly District 8 looked like in 2010 and what
23   it looks like under Act 43. There were parts of
24   the district that were -- parts that were added to
25   the district that are outside the core of the

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1   neighborhoods where the Latino population is
2   concentrated.
3 Q What is the citizen voting age population in the
4   Latino community in Assembly District 8 today?
5 A Let me see if I refer to that. According to my
6   data, which is listed in Exhibit 3 of my rebuttal
7   report, the old Assembly District 8, which is
8   based on the 2010 census and the 2006 to 2010
9   American Community Survey data -- the Latino
10   citizen voting age population was 52.4 percent and
11   Latino voting age population was 65.5 percent.
12   And under Act 43 I believe it's 60.5 percent
13   Latino voting age population.
14 Q What table are you looking at?
15 A Exhibit 3 of my rebuttal report. It doesn't have
16   page numbers on it.
17 Q That's fine. What would those numbers look like
18   if you used 2000 census data for Assembly
19   District 8 in 2002?
20 A I would have to check.
21 Q Do you have any reason -- let's try that one
22   again. The percentage Latino voting age
23   population using year 2000 census data to look at
24   this Assembly District 8 in 2002 would actually
25   show a lower percentage than 2010 census data

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1   today, correct?
2 A It's probable, but I note that there are a lot of
3   moving pieces in these calculations because you
4   have to make adjustments based on estimates of who
5   is a citizen and who is not. I suspect there's
6   reason to believe that the concentrations would be
7   lower, but I am not prepared to make a claim about
8   how much lower.
9 Q On Page 11 of your rebuttal report you refer to
10   treating an effective majority Latino district.
11   What do you mean by an effective majority Latino
12   district?
13 A I mean a Latino district with a majority of
14   sufficient percentage which is not just a bare
15   majority but a majority plus a certain factor to
16   account for some of the turnout and other factors
17   that tend to reduce Latino turnout that's large
18   enough to permit under Act 43 an equal opportunity
19   to elect candidates of choice.
20 Q Is it your opinion that Assembly District 8 in
21   2002 was an effective majority Latino district?
22 A Without looking at the numbers -- if the only
23   piece of information I have to go on is the
24   ethnicity of the representative, that's one piece
25   of the puzzle, but it's not the only one. He may

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1 have run unopposed. He may have been regarded as
2 an especially effective representative. There are
3 other pieces of that that would be part of that.
4 Q When we're looking at the different pieces that
5 tell us about whether a district is an effective
6 majority Latino district, isn't one of the most
7 important pieces what that district has actually
8 been able to do?
9   MR. EARLE: Object to the form of
10   the question.
11   MR. POLAND: Join the objection.
12 A I would say it depends.
13 Q On?
14 A The nature of turnout, who voted, who ran. That's
15 an important piece of information, but it's not
16 the only piece of information that you would need
17 because if you --
18 Q Go ahead.
19 A If you change the configuration of the district,
20 you wind up with a different set of circumstances
21 such that if you added even a small percentage of
22 high turnout non-minority voters you could alter
23 the configuration of the district in a meaningful
24 sense that might make it more difficult for a
25 Latino or minority candidate to continue to get

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1 elected.
2 Q Did that happen under Act 43?
3 A We don't know yet because there hasn't been an
4 election.
5 Q The project that we're engaged in right now is
6 necessarily forward looking, right? We have to
7 figure out what's likely to happen in this
8 district going forward, yes?
9 A That's part of what's going on, yes.
10 Q And isn't the best predictor of what will happen
11 in the future in the sense of whether a district
12 can continue presenting an equal opportunity to
13 vote for a candidate of choice what's occurred in
14 the past?
15   MR. EARLE: I'm going to object to
16   the form of the question.
17   MR. POLAND: Join the objection.
18 A I would say not necessarily. That's one piece of
19 information. Incumbents do lose. It increases
20 the probability, but it's not completely
21 determinative.
22 Q Just so I understand, the fact that Assembly
23 District 8 has elected an exclusively Latino
24 representative for the past 12 years is not a
25 sufficient indication for you that the Latino

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1 community will have an equal opportunity to elect
2 a candidate of their choice going into the future
3 when the voting age Hispanic population is higher
4 today than it was in 2002?
5   MR. EARLE: I'm going to object to
6   the form of the question, foundation.
7   MR. KELLY: The whole nine yards.
8   MR. EARLE: Apples and oranges too.
9   MR. POLAND: Objection, form.
10 A Again, I would say that that's an important piece
11 of information, but it's not the only one. There
12 are other races in the area where Latino
13 candidates have lost and it's not as if all up and
14 down the ticket that the area has been uniformly
15 represented by Latino candidates.
16 Q And of course that's not what we're looking for,
17 right? We're just looking for an equal
18 opportunity to elect a candidate of choice.
19   MR. EARLE: Form.
20 A That's correct.
21 Q So the fact that there are non-Latinos elected
22 from the area encompassed by Assembly District 8
23 doesn't mean that the Latino community doesn't
24 have an equal opportunity to elect a candidate of
25 their choice?

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1 A It depends on a number of other factors such as
2 the degree to which racially polarized voting
3 occurs, whether there was a Latino candidate
4 running who was defeated by a white candidate.
5 Again, I'm not trying to joust semantically with
6 you.
7 Q That's fine.
8 A But an assessment of an equal opportunity to elect
9 candidates of choice goes beyond simply looking at
10 who has won in that particular race. That's a key
11 piece, but you don't stop the analysis at that
12 point anymore than you would conclude that --
13 well, let me just stop there.
14 Q Is it possible that a non-Latino could be the
15 Latino community's candidate of choice?
16 A I would say given the degree of racially polarized
17 voting that my analysis found I would say it's
18 possible but at higher levels of aggregation it's
19 unlikely.
20 Q Professor Mayer, turning our attention briefly to
21 the question of the African American assembly
22 districts, am I correct in reading your report
23 that you are suggesting that the voting age
24 population of African Americans in the six
25 majority-minority districts should be no higher

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1 than 55 percent?

2 A No.

3 Q What are you saying?

4 A I'm saying that that's one commonly used

5   threshold. There have been instances where that

6   number has been lower. My conclusion is that the

7   concentrations are higher than what they need to

8   be.

9 Q What should they be?

10 A Well, I haven't done a specific analysis to peg a

11   particular number, but I believe that the

12   concentrations of numbers in excess of 60 percent

13   are higher than they need to be to give African

14   American voters an opportunity to elect candidates

15   of choice and that by, for example, lowering the

16   concentrations in some of those districts and

17   making that 50.5 district somewhat higher you

18   would help protect that right.

19 Q Given your analysis of the six African American

20   districts, is there a large enough minority

21   population in that area to create a seventh

22   African American majority-minority district?

23 A I don't believe there is.

24 Q Professor Mayer, you submitted reports on behalf

25   of Voces de la Frontera in this case as well, did

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1 you not?

2 A That's correct.

3 Q There was a main report and a rebuttal report?

4 A That's correct.

5 Q Did either the main or the rebuttal report

6   incorporate any information or analysis that was

7   not already included in your main and rebuttal

8   report for the Baldus plaintiffs that have been

9   marked as Exhibits 1017 and 1018?

10 A I don't believe so.

11   MR. EARLE: Can I put these away?

12   MR. KELLY: Yes.

13   (Exhibit No. 1021 marked for

14   identification)

15 Q Professor Mayer, you have been handed now what's

16   been marked 1021. Could you take a look at that

17   and tell me what that is.

18 A This is the initial expert report that I prepared

19   in the *Baumgart v. Wendelberger* litigation in

20   2001-2002.

21 Q When was the last time you had a chance to review

22   this?

23 A I have not reviewed the entire document. I have

24   browsed through it but, I have not had a chance to

25   review it beginning to end.

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1 Q All right. Let's look at Page 26. This is part

2   of your compactness analysis.

3 A Yes.

4 Q There's some prefatorial material there and you

5   mention at the bottom of that page -- you say,

6   "What matters in the compactness analysis is the

7   average of different measures across old districts

8   in a plan and the degree to which different

9   measures tend to give the same general picture of

10   whether the districts are compact or non-compact."

11   Do you see still agree with that statement?

12 A Yes.

13 Q Did you perform an average of different measures

14   across old districts in the Act 43 plan as part of

15   your analysis that you have submitted in this

16   case?

17 A I believe so.

18 Q Where would I find that?

19 A I think it would be in one of the compactness

20   spreadsheets that I had prepared and offered or as

21   part of my December 14th report.

22 Q Do you know offhand what the file name would have

23   been?

24 A Something like assembly compactness and senate

25   compactness. It would be the same files we were

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1 looking at earlier. Assembly 2011 compactness

2 report, senate compactness report.

3 Q Turning to Page 27, there's a list of nine

4   measures of compactness that you used in 2002.

5 A Yes.

6 Q Do you see that? Why did you not use those nine

7   this time?

8 A I imagine that part of it was a function of time.

9   Part of it was that I didn't anticipate the

10   compactness would be a major part of my analysis

11   and so I was trying to keep things simple.

12   (Exhibit No. 1022 marked for

13   identification)

14 Q Professor Mayer, you have been handed what's been

15   marked as Exhibit 1022. Could you look at that

16   and tell me if you have seen it before.

17 A This is the second amended complaint and the text

18   of Act 43. Just let me take a quick look at

19   Exhibit A which I don't know that I've seen

20   before. Exhibit A is a population of the states

21   based on the 2010 census and the apportionment of

22   house members and the change from 2000.

23 Q Have you seen this before?

24 A I have seen the complaint. I have not seen the

25   apportionment table, and, to be honest, I have not

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1   read through the full text of Act 43.
2 Q I'm grateful to hear that.
3 A I get the gist of it from a sampling.
4 Q I have no desire to question you about your
5   understanding of Act 43's actual terms. All
6   right. Let me ask you first -- I may have asked
7   you this earlier. I apologize if I did not. When
8   we were talking about the number of people moved
9   from one district to another under Act 43 -- I may
10   have asked you, and, if so, then I'll apologize.
11   Is it possible to draw a map that -- I'll just
12   start over. Let's look at Page 15 of
13   Exhibit 1022.
14   MR. POLAND: Which page, Dan?
15   MR. KELLY: 15.
16 Q In Subparagraph B in the second sentence it says
17   in part, "Based on the 2010 census 323,026
18   individuals needed to move assembly districts."
19   Do you see that?
20 A Yes.
21 Q Is it possible to draw a map for the state of
22   Wisconsin that moves only 323,026 individuals to
23   equalize population?
24 A There's a short and a long answer to that
25   question. The short answer is probably.
                              197

1 Q How would you do that? Is that the longer answer?
2 A No.
3 Q Tell me what the longer answer is, and then I'll
4   come back.
5 A The longer answer would be probably not without
6   sacrificing some other important redistricting
7   principles. So if your only concern was
8   equalizing population and you didn't care about
9   any of the other principles, you could likely do
10   it this way. You may not be able to get it
11   exactly this. The way that you derive that figure
12   is that you look at the population of the existing
13   districts and the difference between those
14   populations and the ideal population for each
15   district would have a difference. You add that
16   all up and you will get 323,000 or so. It is
17   theoretically possible to draw a new map that
18   moves only as many people as you need to and no
19   more and no less, but that would come at the cost
20   of giving up something along those other
21   dimensions, whether it's compactness -- not
22   contiguity. So the other traditional
23   redistricting principles that you would -- in
24   order to hit that target you would almost
25   certainly be giving up something on those
                              198

1   dimensions.
2 Q Wouldn't it also be true that in order to draw a
3   map that was only that number of people that the
4   districts that need new population are adjacent
5   directly to districts that need to shed that
6   amount of population?
7 A Well, these numbers differ from what I have, and I
8   noted that there was another instance in which my
9   calculation of core district retention differed
10   from what is in this complaint because in the
11   complaint when a new district was created in here
12   that was counted as having a core retention of
13   zero. That's not technically -- the way that I
14   did it it was not zero. It was some fraction of
15   the largest area. I suspect that may be what
16   accounts for some of the difference between my
17   number, which was 500,000 some, and this number.
18   I don't know. I'm not recalling the spreadsheet
19   that was used to generate these estimates.
20 Q Let's address this on a theoretical level first.
21   We can look at a map in the districts and say
22   well, we know that these districts are
23   underpopulated by X amount and these are
24   overpopulated by X amount so we know that that
25   number at a very minimum need to move, right?
                              199

1 A Yes.
2 Q So then to draw a map that moves no more than the
3   sum of those two figures the districts that need
4   to pick up population need to be directly adjacent
5   to districts that need to shed that amount of
6   population, correct?
7 A I'm not sure that's correct. It depends on how
8   you conceive of the circumstances in which
9   population needs to move. As a matter of
10   practicality, in some areas you need to create new
11   districts to accommodate population growth, and,
12   when that occurs, you necessarily have to move
13   what amounts to an ideal population into that
14   district, 57,444 172 something for senate
15   districts. But, again, without actually doing the
16   analysis I can't say whether it depends on the
17   districts being essentially contiguous.
18 Q Have you provided any opinion in this case about
19   the difference between the number of people that
20   were moved versus the minimum number of people
21   that could have been moved?
22 A I did.
23 Q How do you know that you could draw a map in the
24   state of Wisconsin that would move only that
25   minimum number of people?
                              200

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1   MR. POLAND: I'm going to object to

2   the form of the question.

3 A I would have to refer back to the spreadsheet I

4   used to make those calculations to know

5   conclusively how I came up with those numbers.

6 Q Would the minimum number of movements have simply

7   been what you discussed before, you take how many

8   are needed to add to a district to bring it up to

9   population equality and then add the number of

10   people who need to be shed from other districts

11   that you need to get them down to population

12   equality and just add them all up and that's the

13   minimum number?

14 A Without looking at the spreadsheet I used to make

15   those calculations I can't say.

16 Q In any event, you have not tried to draw a map for

17   the state of Wisconsin that moves just the minimum

18   number of people to get to population equality?

19 A I have not, but it's possible to look at some

20   districts that remained mostly in place that only

21   required a movement of a few hundred and that was

22   accomplished by moving several thousand people in

23   and several thousand people out. So you don't

24   need to look at the entire plan and the

25   characteristics of that entire plan to look at

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1   individual districts and note that there was

2   dramatic -- in some cases I identified almost 100

3   times more people moved in and out than were

4   necessary. And these were not instances where new

5   districts were created. These were instances

6   where an existing district was substantially

7   modified.

8 Q Could that have been effected by trying to follow

9   other traditional redistricting principles?

10 A It's possible.

11 Q When you looked at those specific districts where

12   you considered that movement to be especially

13   high, did you do any analysis to see if that

14   amount of movement had been caused by adherence to

15   other traditional redistricting principles?

16 A Well, let me take a look at my --

17   MR. KELLY: Sorry, Peter. You

18   can't put it away.

19   MR. EARLE: Not yet.

20 A Well, one of the things we can look at is if you

21   look at Exhibit 2 which is population shifts in

22   assembly districts. Now without looking at a map

23   of Act 43, I can't say for certain what caused

24   these effects. Let's take an area that lost

25   population, say the Milwaukee area districts which

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1   I believe are Assembly Districts 7 through 13. If

2   you look at those districts, some of them had

3   fairly large population shifts relative to the

4   required shift such as the 7th district which had

5   a population shift of 78,000 when it was only

6   necessary to reduce it by 1,600 but others in that

7   area had population shifts that were relatively

8   modest. 5.4 times as large. 10 times as large.

9   Similarly, if you look at the Dane County

10   districts or the Madison area Dane County

11   districts, which are essentially 76 through 81,

12   you see a similar pattern where some of them have

13   very large or somewhat large areas still lower

14   than the overall average. The 79th assembly

15   district only shifted five times as many people as

16   were necessary for that particular district. The

17   areas with the largest -- the 60th district, which

18   only required a population shift of 10, wound up

19   moving 35,000. I'm not entirely sure where that

20   area is, but I suspect that reflects a significant

21   alteration of the district. So I don't think it's

22   necessarily true that the areas where districts

23   were created and eliminated constitute the whole

24   universe of districts with the largest population

25   shifts relative to what was required. But, again,

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1   without looking at a map -- I would have to look

2   at a map and see where those districts are to

3   identify whether they were in areas with large

4   population growth. Based on the experience in

5   Milwaukee and Madison, I suspect that there

6   wouldn't be a general pattern.

7 Q Is it true that if a district that needs to pick

8   up population to get to population equality is

9   surrounded by districts that also need to pick up

10   population to get to population equality that the

11   affects of getting those to population equality

12   will compound the affect of population shifts from

13   district to district?

14 A I wouldn't necessarily say compound in a situation

15   like that. If you had a set of districts forming

16   an outer ring and then districts inside that --

17   the affects would be additive; that you needed to

18   move people into one district and that means you

19   need to move people from other areas to the

20   districts that lost population and so there would

21   be a ripple effect I guess is how I would prefer

22   to.

23 Q Ripple effect is a good description. With each

24   ripple the amount of population shift grows

25   larger.

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1 A The total population shift would grow larger, but
2   eventually you would reach a point where you had
3   reached another equilibrium where you didn't have
4   to make additional changes.
5   MR. KELLY: We need to switch a
6   DVD.
7   (Recess)
8 Q Professor Mayer, let's turn back to the second
9   amended complaint that's been marked Exhibit 1022.
10   Would you go with me to Page 17. Do you see where
11   it says in (d), "The new legislative districts do
12   not preserve communities of interest and instead
13   needlessly divide cities and other local
14   government units." Do you see that?
15 A Yes.
16 Q And there follows a number of examples. The first
17   one refers to the Clark Square neighborhood in
18   Milwaukee. Do you see that?
19 A Yes.
20 Q Are you providing any opinion on whether or not
21   the Clark Square neighborhood should have been
22   divided?
23 A I believe I included information about how
24   dividing the northern portions of District 8 in a
25   line along 16th Avenue split essentially the

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1   THE WITNESS: When I do it, it's
2   visually for all to see for all eternity.
3   MR. EARLE: People reading the
4   transcript won't know what we're talking
5   about.
6   (Exhibit No. 1023 marked for
7   identification)
8 Q Professor Mayer, you have been handed what's been
9   marked Exhibit 1023. Can you take a look at that
10   and tell me if you have seen this before.
11 A I have.
12 Q What is it?
13 A I believe this is the notice of the deposition and
14   the subpoena ordering me to produce documents.
15 Q Thank you, by the way, for coming here in response
16   to that. Can you turn to the last page that's
17   marked Exhibit A.
18   MR. POLAND: We might have had some
19   problems if he hadn't shown up, right?
20   MR. KELLY: Some might say.
21 Q Did you review Exhibit A before you came here
22   today?
23 A I did.
24 Q Did you look for documents responsive to each of
25   the nine paragraphs listed on Exhibit A?

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1   central business district in that area.
2 Q And does your report provide any reason why we
3   ought to be concerned that that happened?
4 A I would have to double-check, but my recollection
5   is that by splitting essentially a key part of the
6   Latino community that complicates the task of
7   trying to put together coalitions of voters to
8   form majorities.
9 Q On Page 18 there's a reference to the Fox Valley
10   city of Appleton area. Do you see that?
11 A I do.
12 Q Does your report contain any opinion on whether it
13   was a good or bad thing to split that area?
14 A Not in that instance.
15 Q Point (v) refers to three assembly districts in
16   Milwaukee. Are you providing any opinion with
17   respect to those three assembly districts?
18 A Not at this point.
19 Q Paragraph E at the bottom of 18 and continuing
20   into 19 refers to shifting populations of Native
21   American communities. Are you providing any
22   opinion on those issues?
23 A I did not in my report or rebuttal report.
24   MR. KELLY: I'm sorry that was
25   caught on tape.

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1 A I did.
2 Q Would all of those responsive documents have been
3   provided at the beginning of the deposition today?
4 A Yes, with the exception of published materials
5   that I cited in my expert report or rebuttal which
6   are publicly available.
7 Q Okay.
8   MR. KELLY: Do we have a copy of
9   this that we can mark?
10   MR. POLAND: Sure. I've got
11   extras.
12 A And there are some additional files that I
13   produced this morning, the handwritten file and
14   the two data files that I E-mailed to counsel last
15   night.
16   MR. POLAND: Just for the record,
17   the two data files that were E-mailed last
18   night area actually on the CD. We caught
19   those in time to get them on the DVD.
20   (Exhibit No. 1024 marked for
21   identification)
22 Q You have in front of you what's been marked
23   Exhibit 1024. It appears to be a CD or DVD. Does
24   this contain the materials that are responsive to
25   the nine paragraphs on Exhibit A as attached to

1   Exhibit 1023 except for the physical documents
2   that you gave me in addition to this?
3 A On the assumption that this includes all of the
4   material that I provided, yes.
5 Q Okay.
6 A It's a little hard to read.
7 Q Yes. Can you take a look back at Exhibit 1020
8   with me. You remember seeing that earlier today?
9 A I do.
10 Q So the combination of Exhibit 1024 and Exhibit
11   1020, that constitutes the sum total of
12   information responsive to Exhibit A?
13 A Yes.
14   MR. POLAND: Dan, I should put in
15   there that the qualification there is as
16   limited by Rule 26. So, in other words, this
17   is a discussion we have had on an ongoing
18   basis about the carveouts under the new
19   Rule 26.
20   MR. KELLY: Yes.
21   (Exhibit No. 1025 marked for
22   identification)
23   MR. KELLY: We are closing in on
24   the end I say with great trepidation.
25   MR. POLAND: Is this just the

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1   printout that I had?
2   MR. KELLY: Yes.
3   MR. EARLE: You marked this
4   separately?
5   MR. KELLY: Yes.
6 Q Professor Mayer, you have been handed what's been
7   marked Exhibit 1025. Can you take a look at that
8   and tell me what that is.
9 A This is a table that displays the results of an EI
10   or ecological inference run that was performed on
11   the wards and portions of wards that were created
12   in 2002 that existed in what is now Act 43
13   Districts 8 and 9. My goal in performing this
14   analysis was to do a racially polarized voting
15   analysis in the area that is now contained within
16   the area of Act 43 Assembly Districts 8 and 9.
17   Much of the first page is an ecological inference
18   analysis of turnout, and the rest of it is a
19   racially polarized voting analysis that estimates
20   the percentage of Latino and white voters who
21   voted for respectively the Latino -- I suppose the
22   way I've described it is that I also show the
23   percentage of white voters who supported the
24   Latino candidate, and you would get the percentage
25   of white voters who supported the white candidate

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1   by subtracting those estimates by one. All of the
2   numbers in brackets are the -- I believe it's the
3   95 percent confidence interval which is a
4   reflection of the precision of the point estimate
5   of the quantities of interest. Where it says
6   Kings, that's the EI model.
7 Q When did you prepare this?
8 A This was actually prepared by a graduate assistant
9   that I used to conduct the analysis under my
10   direction. I asked him to perform this analysis
11   last Sunday, and he provided this table I believe
12   either Monday or Tuesday.
13 Q Have you had an opportunity to check his work for
14   accuracy?
15 A Not on this table, but I have reviewed the code
16   and data that he used and have every reason to
17   believe that he did this accurately. The code
18   that he used and the data are both on the disk.
19 Q Is there a way we will be able to identify the
20   code and the data that was used to create this
21   table?
22 A I would say that there is a subdirectory on this
23   disk called Voting Rights or Voting Rights
24   Analysis or Voting Rights Files Subdirectory. The
25   programming and data analysis was actually

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1   conducted in an open source statistical package
2   called R which is freely available. Basically
3   anybody with the computing power can run the
4   analysis. The code is in a number of different
5   files that have the file extension .r which will
6   bring up the actual code that's written into the
7   language that looks very much like a language
8   called C or C+. The data is in comma separated
9   values or .csv files which is what you read into R
10   in order to run the analysis and also what R
11   outputs. So anything that has the .csv
12   designation is either a data file or an output
13   file.
14 Q Looking at the first page, there seems to be three
15   groupings of analyses and the distinguishing
16   feature, at least as far as labeling is concerned
17   is -- it appears to be on the first one 8 and 9
18   Together VAP, on the second one 8 and 9 Together
19   LVAP.
20 A That's correct.
21 Q And then the third one 8 and 9 Together LVAP
22   Citizenship Adjusted?
23 A That's correct.
24 Q I assume this is covering different populations or
25   subsets of populations?

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1 A Estimates of different subsets of populations.
2 Q Let's start with the first one, 8 and 9 Together
3   VAP. What population is that encompassing?
4 A That is the total voting age population of
5   Districts 8 and 9.
6 Q And the second one, would that be the total Latino
7   voting age population in Districts 8 and 9?
8 A That's correct.
9 Q And then the third one would be the total citizen
10   Latino voting age population in Districts 8 and 9?
11 A That's correct.
12 Q On the second page, the last column to the right,
13   there's a column headed N of Wards. I assume
14   that's Number of Wards?
15 A Correct.
16 Q What does that tell me?
17 A That tells you the number of wards for which we
18   have data for that particular race in that row.
19   So, for example, the county supervisor in
20   District 12 occurred in only a subset of the wards
21   that are in Act 43. Again, I want to make it
22   clear that I'm talking about the old wards so we
23   could easily get access to the election
24   information as opposed to the races of state
25   superintendent, circuit court which were either

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1   statewide or countywide races. Again, we're
2   looking at the voting behavior within the area
3   comprised of Act 43, 8 and 9 and that is 61 wards
4   and then the 12th aldermanic district consists of
5   all or part of 21 wards that are in that area.
6 Q I will leave the balance of that report to the
7   statisticians who are significantly more qualified
8   than I to opine.
9   MR. KELLY: If I could have maybe
10   five minutes to see if I need anything else.
11   MR. KASPER: And I will have just a
12   couple clarification.
13   (Recess)
14 Q Professor Mayer, thank you for your patience with
15   me today. Can you tell me all of the expert
16   opinions that you have as of this date, have they
17   ben encapsulated in the reports that you have
18   filed?
19 A There are a number of things that I only recently
20   learned which could play into opinions that I
21   express.
22 Q What are those things?
23 A One of them is this analysis that I did in
24   response to the rebuttal report of
25   Bernard Grofman, Dr. Grofman. That was the first

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1   time I had seen anything that he had produced.
2   The second is some documents that I have seen and
3   a deposition that I attended on Wednesday having
4   to do with some what you might call anomalies
5   between the geo location of certain number of
6   voters and their assignment to congressional
7   legislative districts under the statewide voter
8   registration system. I haven't completed my
9   analysis because we have asked for documents that
10   I have not yet seen. So I may have an opinion on
11   the population movement and population equality in
12   congressional districts.
13 Q Aside from the issue with respect to the
14   anomalies, are you planning on updating or
15   submitting an additional expert report in this
16   case?
17 A I don't know.
18 Q When might we know that?
19 A I suppose it would depend on subsequent
20   depositions. If I thought that there was
21   something that I felt important to respond to, an
22   extension of work that I had done, but that would
23   be the circumstance in which I would see the need
24   to do that.
25 Q And if a court were to allow you to submit an

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1   additional report on issues other than the
2   anomalies, would you agree to return here so that
3   I can ask you some more questions about those
4   opinions?
5 A Yes.
6   MR. KELLY: Thank you. I have
7   nothing further.
8   THE WITNESS: You're welcome.
9   Thank you.
10
11   EXAMINATION
12 By Mr. Kasper:
13 Q Professor Mayer, thank you for being here today.
14   I know it's been a long day for you even more than
15   the rest of us. I just have a few questions
16   mostly by way of clarification on stuff that you
17   have already covered.
18   It you could turn to your initial report
19   which I believe is Exhibit 1017 and Page 6 of that
20   report. Have you got it?
21 A Yes.
22 Q Earlier I know you had the large book in front of
23   you with among other things the two different
24   constitutions which I will not, thankfully, make
25   you refer to again now. But as you can see, the

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1 last sentence on the bottom of Page 6 after going
2 through the constitutional requirements that we
3 discussed it says, "In addition to the statutory
4 and constitutional requirement, states are bound
5 to comply with traditional redistricting
6 principles which include," and then on Page 7 it
7 begins, "Respect for existing political
8 subdivisions" and goes on through numbers one
9 through four. Do you see that?
10 A Yes.
11 Q Is my understanding correct that those factors are
12 those whose consideration was required by federal
13 courts in decisions that you relied on?
14 A I don't know that I would say required, but they
15 can be factors in a court invalidating a plan if
16 they judge that the fidelity of these principles
17 is insufficient. So there may not be a specific
18 statutory or constitutional provision that
19 applies, but the traditional redistricting
20 principles go beyond that as courts have fleshed
21 out at least in terms of the federal constitution
22 constitutional requirements generally stem from
23 equal protection and 14th Amendment issues. But
24 the others are things that have been developed
25 over time as courts have continued to look at

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1 these issues since the 1960s.
2 Q So is there a requirement that anyone who is
3 drawing a map at a legislature's behest needs to
4 require each of these factors as you call them?
5 It's more of the after the fact these are what the
6 court has considered in the cases you're familiar
7 with?
8 A I would consider it very poor practice for someone
9 to draw a map without keeping these things in
10 mind.
11 Q And do you remember the names of those decisions
12 in federal courts for these principles
13 specifically?
14 A I don't think I could rattle them off the top of
15 my head.
16 Q I was just impressed because on some other points
17 you did seem to have a fairly good handle on some
18 cases you did rely on. Fair enough. Is it your
19 understanding that the cases you did rely on,
20 regardless of whether you remember the specific
21 parties' names here, that whether it be these four
22 or other ones you have mentioned in other contexts
23 today there's no other principles that you're
24 familiar with that would be advisable or required
25 for someone drawing a map to consider? You did

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1 mention them in other contexts. I'm including
2 anything that you discussed with Mr. Kelly today.
3 A Yes. Some of it -- if we're not talking about
4 congressional districts, there are some -- well,
5 actually in the case of congressional districts
6 there are some procedural issues that are required
7 in different state contexts. I mentioned Iowa for
8 example.
9 Q Sure.
10 A Some states require the districts to be drawn to
11 achieve a certain level of competition which is
12 not the case here.
13 Q By here you mean it's not required in Wisconsin?
14 A That's correct. So I don't maintain that this is
15 an exclusive list. There may well be others. In
16 fact there are others that if I thought about hard
17 enough I could --
18 Q Or maybe if you had the decisions in front of you
19 you would be able to identify them?
20 A Yes.
21 Q And then in a similar vein, can you just turn to
22 the next page. I'm sorry. It's Page 8 of the
23 same report. I guess it's the second full
24 paragraph thereof. Do you see the phrase that
25 begins, "The process obtaining constitutional

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1 equality must occur while recognizing the
2 importance of minimizing the number of dramatic
3 changes in district configurations"?
4 A Yes. I see that.
5 Q And just to be clear, your understanding of the
6 prescription as you understand it comes from those
7 same federal court cases that you may not remember
8 specifically here but you relied upon generally?
9 A Well, there are statutory provisions as well. If
10 you devised districts, whether congressional or
11 legislative, that weren't contiguous, I would
12 imagine that would be overturned on that basis.
13 Q Is there a statutory requirement that
14 congressional districts are drawn to be contiguous
15 in Wisconsin?
16 A I would have to check. I believe there is, but
17 I'm not entirely certain whether it's a
18 constitutional requirement or if there may be a
19 federal statute that requires that.
20 Q But as you sit here you cannot recall a specific
21 federal or state statute that would be applicable
22 to Wisconsin redistricting for that purpose?
23 A Not off the top of my head, no.
24 Q Understood. If you look at the same page, Page 8,
25 Footnote 1, this is just something that is

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1 particular to congressional districts. Do you see
2 where it says, "Congressional districts must be
3 nearly exactly equal in population"?
4 A Yes.
5 Q Can you tell me where you gleaned that requirement
6 from.
7 A Again, I can't cite the specific decisions, but
8 there are a number of instances where
9 congressional plans have been invalidated on the
10 basis of very, very small population deviations,
11 far less than 1 percent, and the most common
12 practice among congressional districts, as there
13 was in the case here, is to drive those population
14 deviations down to either zero or as close to zero
15 as you can get. I think the total deviation in
16 the eight congressional districts here was
17 actually one person. If you have population
18 that's not equally divisible by eight, you have no
19 choice but to do that.
20 Q Sure. Just one final point I just want to get
21 your clarification on. Can you go up on that same
22 page, the first full paragraph, and it's actually
23 after assembly, but it's talking about --
24 A What page are we on?
25 Q Page 8 of the same report. The first full
221

1 paragraph.
2 A Okay.
3 Q It starts with, "Without some degree of stability
4 voters who may have established relationships with
5 their legislators will be forced to begin anew
6 with a different slate of legislators." Do you
7 see that?
8 A Yes.
9 Q And is that something that would go in that same
10 vein I think as you discussed it here but it's
11 something that would be advisable if not required
12 for someone drawing a map to consider?
13 A I would regard that as a traditional redistricting
14 principle having to do with -- the whole purpose
15 of reapportionment in redistricting is to serve
16 the representational purpose of legislatures and
17 the equal population requirement is designed to
18 ensure that voters in different districts within a
19 single state have the -- their vote carries the
20 same weight. But a broader purpose is to protect
21 the integrity of that relationship, that
22 representational relationship, which is where the
23 traditional redistricting principle of core
24 population retention comes into play. If you
25 radically reconfigure districts so that everybody
222

1 is moved around every time and there's no
2 stability, voters do have an interest in
3 maintaining relationships with their elected
4 officials even though that doesn't translate into
5 an interest in elected officials to having a
6 particular right to a seat or to represent a
7 certain area. But that is a broader philosophical
8 question.
9 Q When you say that relationship, you mean the
10 relationship between an individual voter with an
11 individual legislator for example?
12 A Or groups of voters with a legislator. It doesn't
13 necessarily implicate -- well, it actually does
14 implicate the relationship between a single voter
15 and a representative, but, in terms of the
16 collective relationship, that's important as well.
17 Q And so it would be fair to say that your
18 understanding is that at least for some voters
19 there is value in having the same individual
20 continue to represent them based on that existing
21 relationship?
22 A I would say that there is some interest in
23 continuity to the extent that it doesn't conflict
24 with other interests. Whether that's the same
25 individual depends on the decision made at the
223

1 subsequent election, and that's something that is
2 left entirely to the voters.
3 Q And in the cases you have reviewed from federal
4 courts talking about what considerations are
5 proper if not required when drawing legislative or
6 congressional maps, does that then mean that it's
7 proper to consider that and with the end of mind
8 being to facilitate that relationship on a going
9 forward basis?
10 A I would respond there are many ways to do that.
11 It would depend on what specific element of that
12 that you're speaking of.
13 Q It would be among the factors you would consider?
14 A Again, I would need to know more specifically how
15 you conceptualize that.
16 Q For example, are you familiar with any cases where
17 it was recognized as proper to have the goal of
18 not putting two incumbents in one district so that
19 necessarily one incumbent's relationship with the
20 voters and the voters' relationship with that
21 legislator would necessarily be broken?
22 A I know of states where that's not a consideration
23 that can be taken into consideration. I'm not
24 aware of any court decisions that speak of
25 incumbent pairings as a violation of any
224

1   particular principle.

2 Q Would those considerations, though, be among the

3   permissible or traditional principles as you

4   understand them?

5 A I would say that other than -- I'm just thinking

6   of how best to phrase this. I'm not aware of any

7   specific prohibition against, a general

8   prohibition, against pairing incumbents although I

9   can conceive of a situation where an excessive

10   extremely large number of pairings could be one

11   factor that could go into a decision that a

12   particular map might not be valid. But it would

13   take an extreme number.

14 Q Would it be legitimate for someone drawing a map

15   to consider that possibility of trying not to put

16   two incumbents together in a district in one case

17   or in several cases across the map and in doing so

18   lessen the efficacy of other traditional

19   redistricting principles that you have laid out

20   today?

21   MR. POLAND: Object to the form of

22   the question.

23 A It depends on how that was done and what other

24   principles were at stake. If you drew a district

25   that was irregularly shaped and had a little

225

1 A Congressional.

2 Q Interesting slip of the keyboard there, right?

3   "It appears that the congressional redistricting

4   plan has the same flaws as the legislative plan,

5   with respect to the arbitrary movement of more

6   people than was necessary to achieve population

7   equality and failure to adhere to the traditional

8   redistricting principles. Absent explanation,

9   there is no apparent apolitical reason for the

10   changes made." Do you see that opinion?

11 A Yes.

12 Q Has anyone shown you or have you seen any

13   explanation for the movement of more people than

14   necessary to achieve population equality in the

15   congressional districts?

16 A No, I have not.

17 Q Does that opinion still stand?

18 A Yes.

19 Q You were asked before also by Mr. Kelly some

20   questions with respect to the African American

21   districts in Milwaukee. Do you recall those

22   questions?

23 A I do.

24 Q Have you conducted any analysis or been asked to

25   conduct any analysis as to whether there is

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1   tendril that went out 150 miles to pick up the

2   residence of an incumbent -- actually, in the case

3   of congressional districts I don't think it

4   matters because the only constitutional

5   requirement is that they be a resident of the

6   state. But as a practical political matter the

7   expectation is that the people, candidates, will

8   live in the district that they are running in.

9   I'm not aware of any specific prohibition one way

10   or the other that says you can't do it or that

11   there's no limit on what you can do.

12   MR. KASPER: No further questions.

13   MR. EARLE: I have nothing.

14   MR. POLAND: I have just a couple

15   questions.

16

17   EXAMINATION

18 By Mr. Poland:

19 Q Dr. Mayer, if you could keep your report out in

20   front of you, please. On Page 6 of your report,

21   this is Exhibit 1017, in the third bullet point

22   you state, and I believe Mr. Kelly asked you some

23   questions about this before -- you state, "It

24   appears that" -- it says confessional. Is that

25   supposed to be congressional?

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1   sufficient African American population to create a

2   seventh assembly district, African American

3   assembly district?

4 A Actually, not a comprehensive one. My original

5   assessment was based on a quick look at the data

6   about how many African American voters or what the

7   number of the voting age population that could be

8   reallocated or freed up if you lowered the

9   percentage voting age population to 55 percent. I

10   believe I stated that in that instance -- the last

11   paragraph of my report is that if you reduce the

12   African American voting age population to

13   55 percent in the 10th, 11th, 16th, 17th and 18th,

14   you would free up roughly 13,000 African American

15   voters. I actually don't know whether that's

16   sufficient to -- I haven't looked about whether

17   that would be a sufficient population to

18   constitute a majority nor have I looked at

19   alternate configurations.

20 Q So it might be possible. It might not be

21   possible. You just don't have an opinion as you

22   sit here today.

23 A As I look at the data that I actually used, that's

24   correct.

25 Q Dr. Mayer, you also testified I believe in

228

1   response to questions that either Mr. Kelly or --
2   I think it was Mr. Kelly had asked you. You
3   mentioned that you had recently seen some data
4   regarding so-called anomalies in redistricting
5   data, correct?
6 A Correct.
7 Q And that's a process as you understand that's part
8   of the discovery process that's ongoing; is that
9   correct?
10 A As I understand it, yes.
11 Q From what you have seen so far, is it possible
12   that there is material that could be discovered
13   that might cause you to formulate new opinions
14   with respect to congressional districts?
15 A That's correct.
16   MR. POLAND: I have no further
17   questions.
18   MR. KELLY: Nor do I.
19   Peter?
20   MR. EARLE: Nor do I.
21   (Adjourning at 6:33)
22
23
24
25
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1 STATE OF WISCONSIN)
) ss.
2 COUNTY OF DANE   )

3   I, SUSAN C. MILLEVILLE, a Court Reporter
4 and Notary Public duly commissioned and qualified in
5 and for the State of Wisconsin, do hereby certify
6 that pursuant to notice and subpoena, there came
7 before me on the 27th day of January 2012, at 9:17 in
8 the forenoon, at Godfrey & Kahn, S.C., Attorneys at
9 Law, One East Main Street, the City of Madison,
10 County of Dane, and State of Wisconsin, the following
11 named person, to wit: KENNETH R. MAYER, Ph.D., who
12 was by me duly sworn to testify to the truth and
13 nothing but the truth of his knowledge touching and
14 concerning the matters in controversy in this cause;
15 that he was thereupon carefully examined upon his
16 oath and his examination reduced to typewriting with
17 computer-aided transcription; that the deposition is
18 a true record of the testimony given by the witness.
19   I further certify that I am neither
20 attorney or counsel for, nor related to or employed
21 by any of the parties to the action in which this
22 deposition is taken and further that I am not a
23 relative or employee of any attorney or counsel
24 employed by the parties hereto or financially
25 interested in the action.
                    230

1   In witness whereof I have hereunto set my
2 hand and affixed my notarial seal this 29th day of
3 January 2012.
4
5   _____
       Notary Public, State of Wisconsin
6
   My commission expires
7 June 23, 2013
8
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